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Title Theft

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Title Theft

Stewart E. Sterk*

Abstract

Real property owners across the country have been targeted by scammers who prepare deeds purporting to convey title to property the scammers do not own. Sometimes, the true owners are entirely unaware of these bogus transfers. In other instances, the scammers use misrepresentation to induce unsophisticated owners to sign documents they do not understand.

Property doctrine protects owners against forgery and fraud—the primary vehicles scammers use in their efforts to transfer title. Owners enjoy protection not only against the scammers themselves, but generally against unsuspecting purchasers to whom the scammers transfer purported title.

Recovery of title, however, involves costs and delays that are difficult to bear, especially for victims without significant resources—often the favorite targets of scammers. Legislators have proposed a variety of reforms to make unauthorized transfers more difficult. Most of the proposed reforms, however, would do little to ease the financial burden on victims. Victims cannot generally rely on title insurance because the standard title insurance policy does not protect the insured against title defects that arise after issuance of the policy. Requiring title insurers to cover post-policy forgery and fraud would ease the burden on victims without significantly increasing costs to title insurers.

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INTRODUCTION

A team of prospective property thieves divides responsibility. Scammer A selects target properties, checks publicly available property records to identify the owners, and creates identification documents for Scammer B, who will impersonate the owner at a closing. Scammer C, a real estate salesperson, recruits potential buyers for the property, while Scammer D, a disbarred lawyer, drafts legal documents and appears at closing to represent the imposter sellers. When the sales close, the thieves pocket the funds derived from the sales—leaving the owners and the buyers to sort out the wreckage. Variations on this pattern—derived from a 2022 indictment in New York¹—have been reported across the

1. See Bill Parry, *Five Members of Deed Theft Crew Operating in Southeast Queens Indicted on Multiple Felon Charges*, QNS (Dec. 9, 2022), <https://perma.cc/GA25-8436> (“Five members of a deed theft ring operating in southeast Queens were indicted for allegedly stealing three homes worth more than \$1 million in total from elderly and vulnerable homeowners in Jamaica

country in states as far flung as California,² Florida,³ Texas,⁴ Pennsylvania,⁵ and North Carolina.⁶

This form of property “theft” occurs without the knowledge of the property’s rightful owner.⁷ In another form, scammers approach property owners—generally those in financial distress, and often people of color—and offer to provide financing not readily available from commercial lenders.⁸ As part of the supposed refinancing process, the owner, sometimes unknowingly, signs a deed, enabling the scammers to resell the property and pocket the proceeds.⁹

and St. Albans, state Attorney General Letitia James announced Friday, Dec. 9.”).

2. See *Mastermind of Multi-Million Dollar Real Estate Fraud Pleads Guilty*, U. S. ATTY’S OFF. S. DIST. CAL. (Jan. 5, 2016), <https://perma.cc/9LBK-HZTY> (“[A] real estate investor, admitted today that he orchestrated a scheme to steal title to Southern California homes and then sell the properties to unsuspecting buyers before the true owners could put a stop to the sale.”).

3. See Lisa J. Huriash, *Thieves Steal South Florida Homes, Leaving Victims with Legal Nightmare*, THE SPOKESMAN-REV. (Apr. 15, 2023), <https://perma.cc/73UW-YVH7> (describing multiple incidents in Florida where “thieves lied on affidavits, saying people were heirs when they were not, but those fake heirs never had to show up in court and the true heirs lost the properties”).

4. See *Dallas Man Heads to Prison for Deed Fraud Scheme*, U. S. ATTY’S OFF. S. DIST. TEX. (Feb. 9, 2023), <https://perma.cc/6RBE-UP8H> (“A 61-year-old man has been sent to federal prison following his conviction of money laundering as well as conspiracy to commit and committing wire fraud, announced U.S. Attorney Alamdar S. Hamdani.”).

5. See Mensah M. Dean, *House-Stealing Ring That Preyed on the Living and the Dead Is Busted*, PHILA. INQUIRER (Jan. 10, 2022), <https://perma.cc/FFX3-EFCR> (describing real estate theft in Philadelphia).

6. See *Man Indicted for Forging Deeds to Steal N. Carolina Property*, ASSOC. PRESS (May 5, 2022), <https://perma.cc/46A5-DYDM> (“A Georgia man has been indicted on charges that he used the identities of seven North Carolina residents to forge deeds and have their property fraudulently transferred to him, officials said.”).

7. See *supra* notes 2–6; Chen, *infra* note 8 and accompanying text.

8. See Stefanos Chen, *He Admitted Stealing People’s Homes. He’s Charged with Doing It Again*, N.Y. TIMES (Jan. 18, 2023), <https://perma.cc/SAV6-FHCW> (“Homeowners at risk of foreclosure are told they qualify for a short sale, a deal in which the lender settles for less than the balance of the mortgage. The homeowners usually believe that they are selling the home in exchange for debt forgiveness and sometimes a small amount of cash.”).

9. See Kimiko de Freytas-Tamura, *Why Black Homeowners in Brooklyn Are Being Victimized by Fraud*, N.Y. TIMES (Oct. 21, 2019),

The troubling incidence of these and other property frauds has captured the attention of the media¹⁰ and of public officials.¹¹ The scams have also spawned an industry selling homeowners purported protection against property theft¹²—protection ordinary title insurance policies do not currently provide. Some commentators, however, have argued that the threat of property theft is vastly overstated, and the risks are small.¹³ Fearmongering, they argue, might cost

<https://perma.cc/QWC8-GHFF> (“A booming real estate market in Brooklyn is fueling a crime that law enforcement authorities say has taken hold in largely African American neighborhoods that are being gentrified—deed theft, which involves deceiving or sometimes coercing a homeowner into signing forms that transfer ownership of a property.”).

10. See Kiah Treece, *Home Title Theft: How to Protect Yourself*, FORBES (Feb. 2, 2023), <https://perma.cc/67CQ-JGAG> (warning the public about title theft).

11. See Press Release, Congressman Emanuel Cleaver, Chairman Cleaver, Rep. Evans Introduce Legislation to Combat Deed Fraud, Protect Homeowners (Oct. 19, 2022), <https://perma.cc/6P27-YENS> (“Today, U.S. Representative Emanuel Cleaver, II (D-MO), Chairman of the Financial Services Subcommittee on Housing, Community Development, and Insurance, along with Rep. Dwight Evans (D-PA), introduced H.R. 9192, the *Good Documentation and Enforcement of Estate Deeds (Good DEED) Act.*”); see also Press Release, N.Y. Att’y Gen., Attorney General James Takes Action to Protect New Yorkers’ Homes and Combat Deed Theft (Apr. 27, 2023), <https://perma.cc/SLR8-6ACQ> (“New York Attorney General Letitia James, State Senator Brian Kavanagh, State Senator Zellnor Myrie, and Assemblymember Helene Weinstein today announced new legislation to strengthen protections and remedies for victims of deed theft and bolster the Office of the Attorney General’s (OAG) ability to prosecute these crimes.”).

12. See *Questions? We Have Answers.*, HOME TITLE LOCK, <https://perma.cc/2JAR-PJ2N> (touting itself as “The Leader of Home Title Protection”); *Best Home Title Protection of 2023 Protect Your Greatest Asset*, TOP10.COM, <https://perma.cc/CP8Q-788U> (ranking companies offering title protection services).

13. See Larry Light, *The Home Title Theft Baloney*, FORBES (Sept. 11, 2021), <https://perma.cc/G2UK-KFN6>

The claims are so over the top that these companies either don’t understand the law or are intentionally bending the facts. Like most things, these outlandish claims include a grain of truth. It is true that anyone can forge your name to any document, including a deed supposedly transferring title to the forger. Such a deed could be filed with the county register of deeds.

homeowners far more in protection premiums than the so-called protection is worth.¹⁴

The skeptics are correct that title theft is relatively rare and that in almost all circumstances, the rightful owner is entitled to recover title and possession.¹⁵ But title theft is nevertheless devastating for victims, many of whom do not have the knowledge or resources to vindicate their legal rights.¹⁶ For the legal system, the challenges are reducing the risk of title theft and spreading the cost of whatever risk remains. This article explores those challenges.

Part I explores how the increased accessibility of real estate records has expanded opportunities for property theft.¹⁷ Part II explores the legal consequences for owners, buyers, and lenders when scammers succeed.¹⁸ Part III examines potential solutions, explaining why many of the alternatives propounded by public officials would be ineffective or counterproductive.¹⁹ Part III also develops a framework for a solution focused on modifications to existing title insurance policies.²⁰

I. THE MECHANICS OF TITLE THEFT

The practice colloquially known as title theft or deed theft follows a number of different patterns.²¹ All of them, however, rely in some measure on access to property records.²² Before exploring the mechanics of these schemes, this Part briefly summarizes the state of American property records.²³

14. See Dave Lieber, *As Ken Paxton Probes Home Title Lock, Here's How You Can Get Title Protection for Free*, DALL. MORNING NEWS (Mar. 23, 2023), <https://perma.cc/MPX3-BWH3> (noting that Texas counties offer, for free, much of the protection Home Life Lock offers to its customers).

15. See Light, *supra* note 13.

16. See *supra* notes 2–9 and accompanying text.

17. See *infra* Part I.

18. See *infra* Part II.

19. See *infra* Part III.

20. See *infra* Part III.

21. Title theft and deed theft refer to the same practice. Because in cases of forgery no physical deed is actually stolen, I use “title theft” in describing the problem. Use of the “deed theft” term, however, is quite common. See Chen, *supra* note 8.

22. See *infra* Part I.A.

23. See *infra* Part I.A.

A. *Expanding Access to Property Records*

American property law remains based on the concept of relative title.²⁴ Despite periodic calls for adoption of a title registration system,²⁵ no American state maintains a complete official, legally binding registry of title to real property.²⁶ Unlike the fictional game of “Monopoly” there is no single deed to any parcel of real property. Instead, each seller executes a new deed transferring the seller’s interest to a purchaser, who then records the deed. The collection of recorded deeds, typically indexed by grantor and grantee, constitutes the public record a prospective purchaser must search to assess the risks associated with purchasing the subject property.²⁷ Property records are maintained locally, typically in county offices.²⁸ Local control makes it feasible for purchasers to record deeds without traveling long distances and provides the same convenience to title searchers.²⁹ Digitization of title records has made it even

24. See *Armory v. Delamirie*, 1 Strange 505, 93 Eng. Rep. 664, 664 (1722) (providing a classic illustration of the common law’s embrace of relative title. The court held that “the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner”). Recording statutes illustrate application of the relative title concept with respect to real property. The typical notice statute, for instance, invalidates unrecorded conveyances against subsequent purchasers without notice who paid valuable consideration. See FLA. STAT. § 695.01(1) (2023). The unrecorded conveyance, however, remains valid against the original transferor and against subsequent parties who took with notice of the conveyance.

25. See Myres S. McDougal & John W. Brabner-Smith, *Land Title Transfer: A Regression*, 48 YALE L.J. 1125, 1125 (1939) (pioneering the classic call for adoption of a registration system, now more than 80 years ago).

26. See Stewart E. Sterk, *Title Insurance: Protecting Property At What Price?*, 90 WASH. U. L. REV. 519, 524 (2021) (noting that although registration is available in some states, real estate practice generally relies on recording to provide potential buyers with information about the state of title).

27. For a description of the process of using indexes to search title, see Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1365–66 (2010).

28. See Reid K. Weisbord & Stewart E. Sterk, *The Commodification of Public Land Records*, 97 NOTRE DAME L. REV. 507, 519 (2022) (“Deeds and other land records are typically recorded locally, generally at the county level.”).

29. For an argument that local control is no longer important, see Tanya Marsh, *Foreclosures and the Failure of the American Land Title Recording*

easier for searchers to uncover the identity of current property owners.³⁰ Title searches can be conducted wherever a personal computer is accessible.³¹ The personally identifiable information contained in the property records can be harnessed for many purposes—including perpetrating real estate forgery and fraud.³²

B. *The Mechanics of Deed Forgery*

The recording system makes it impossible for a potential scammer to steal or rewrite existing deeds.³³ Once a deed is recorded, it furnishes a permanent record of the underlying transfer.³⁴ Therefore, the prevalent strategy for a scammer is not to “steal” an existing deed, but instead to forge a new deed from the current record owner to the forger, an entity controlled by the forger, or a member of the forger’s “team.” Once the forgery is complete, the forger records the deed.

The county records office, however, will not accept a deed for recording unless the transferor’s signature has been acknowledged by a notary (or, in many states, an authorized public official).³⁵ The forger might furnish an imposter with fake papers identifying the imposter as the most recent record owner, and then present the notary with those false identification papers.³⁶ Or the forger might steal, borrow, or forge a notary’s

System, 111 COLUM. L. REV. SIDEBAR 19, 25 (2011) (arguing that “[i]t is no longer important that the recording office be located within one day’s horse ride of the county limits”).

30. For a description of the impetus for digitization, and some of the problems it has created, see Weisbord & Sterk, *supra* note 28, at 520–35.

31. See *id.* at 519 (describing the ease of accessing land records in modern day due to digitalization).

32. For a general discussion of the impact of harvesting the personally identifiable information in property deeds, including concerns about data privacy, see *id.* at 538–49.

33. See *id.* at 520–36 (describing the modern recording system).

34. *Id.*

35. See CAL. CIV. CODE § 1181 (2023) (listing officers authorized to acknowledge instruments).

36. See GRAND JURY SUP. CT. STATE N.Y., CNTY. N.Y., REPORT ISSUED PURSUANT TO CRIMINAL PROCEDURE LAW SECTION 190.85 SUBDIVISION (1)(C) 13 (2018) (hereinafter “GRAND JURY”), <https://perma.cc/7UGD-LYAT> (PDF).

stamp and then forge the notary's signature.³⁷ Or the notary might be a participant in the scam.³⁸ Once the forged deed is notarized, the county records office will accept it for recording; so long as the deed appears regular on its face, the office will have no basis for detecting the forgery and no legal authority to reject a deed that meets all formal requisites.

Once the forged deed is recorded, the forger is ready to arrange a sale to a prospective buyer. If the buyer or the buyer's representative checks the record, the buyer will see what looks like a valid deed from the prior owner to the forger. But if someone else – the prior owner – is in possession of the property, the buyer will suspect a problem. Under established law, a purchaser is on inquiry notice of the interests of persons in possession of property.³⁹ That is, even if someone other than the person in possession appears to be the record owner, a purchaser takes subject to the interests of the person in possession – creating a “duty” to inquire – most obviously by approaching the possessor directly.⁴⁰

To avoid this problem, the forger will generally target vacant or neglected properties.⁴¹ Properties owned by a recently deceased owner are favorite targets.⁴² Heirs of a deceased owner are unlikely to learn of the forgery or the subsequent sale until

37. See Craig R. McCoy, *Stealing from the Dead*, PHILA. INQUIRER (Jan. 23, 2019), <https://perma.cc/M5QZ-N8H7> (“Thieves and forgers are taking houses from the deceased in ‘hot’ neighborhoods — as the city stands by.”).

38. See Rob Wolchek, *Nasty Notary's Plea Comes as a Surprise After Deed Stealing Scheme with Ex-Lawyer*, FOX2DETROIT (June 12, 2023), <https://perma.cc/Y2ZC-E684> (“Prosecutors says they ran a scheme to steal two houses from Donna Alford by forging quit claim deeds to homes she'd inherited from family members.”).

39. See *Cohen v. Thomas & Son Transfer Line, Inc.*, 586 P.2d 39, 41 (Colo. 1978) (“Under these circumstances, we conclude that reasonable inquiry would have included inquiry of the lessee who was the sole tenant in possession.”); *Claffin v. Comm. State Bank of Two Harbors*, 487 N.W.2d 242, 248 (Minn. Ct. App. 1992) (“Actual, open possession and use of property puts a subsequent purchaser on inquiry notice of the possessor's rights in the property.”).

40. See cases cited *supra* note 39.

41. See Caresse Jackman, *Federal Law Enforcement Sees ‘Sharp Increase’ in Vacant Property Scams*, WCSAZ NEWS CHANNEL 3 (Mar. 8, 2023), <https://perma.cc/T4ZT-4X32> (“Federal law enforcement has seen a sharp increase in reports of real estate fraud involving vacant property, according to a joint advisory issued by the U.S. Secret Service and CertifID.”).

42. See McCoy, *supra* note 37.

after the sale has occurred and money has been transferred to the forger or an entity the forger has created.

The forger faces another problem if the property was subject to a mortgage: the lender's mortgage interest will remain of record, and binding on any purchaser, unless the forger obtains a release of the lender's interest. The forger could forge the signature of a bank representative – and a notary – on a satisfaction document, but in most cases, it is simpler to target properties not subject to a mortgage.

C. *Theft by Fraud*

Another species of property theft requires the owner's active, if unwitting, participation. Unlike the forger, who operates entirely without the owner's knowledge, the fraudster typically obtains the owner's signature on a deed conveying the property to the fraudster or a related entity.

In contrast to the forger, whose ideal target is debt-free property held by an absentee owner, the fraudster focuses on owners in financial distress, often those unable to make mortgage payments on the property.⁴³ Communities with large percentages of black and brown residents have generated disproportionate instances of fraud.⁴⁴ Indeed, minority participation in the fraud scheme may be effective in building trust among fraud victims.⁴⁵

The fraud can take several forms. In one version, the fraudster purports to arrange a short sale of the property, leading the owner to believe that a transfer of the property will relieve the owner of mortgage debt.⁴⁶ The owner then executes a deed to the fraudster, or a shell company dominated by the fraudster, but no one arranges a release of the mortgage, which

43. See Chen, *supra* note 8.

44. See Kimiko de Freytas-Tamura, *supra* note 9.

45. The tactic of targeting victims of the fraudster's own racial background is sometimes referred to as "affinity marketing." See *Ringleader of Real Estate Scam Targeting Minorities is Sentenced*, LEGAL SERVICES NYC (Aug. 30, 2018), <https://perma.cc/NP38-GC6C>. For an example of a predatory lending scheme by a minority firm targeting minority communities, see *McGlawn v. Pa. Human Relations Comm'n*, 891 A.2d 757 (Pa. Commw. Ct. 2006).

46. See Chen, *supra* note 8.

still binds the original owner.⁴⁷ The fraudster then rents out the property until the mortgagee forecloses.⁴⁸

In another version, the fraudster actually does arrange a short sale with the lender, but simultaneously arranges to buy from the lender at a below-market price, and then retains the property or resells the property at far more than the fraudster paid the lender.⁴⁹

In still a different form of fraud, the perpetrator claims to arrange a second mortgage loan to enable the owner of property in a gentrifying area to forestall foreclosure of a first mortgage.⁵⁰ In fact, however, the fraudster induces the owner to execute not the personal loan document, but a deed to the property.⁵¹ The owner receives only a fraction of the property's value.⁵²

These and other forms of fraud all prey on unsophisticated owners facing financial difficulties. The fraudster misleads the frightened owner into signing documents the owner never would have signed if the owner understood their import.

II. THE LEGAL LANDSCAPE

In most cases, the objective of the victim of title theft is restoration of her property interest. The victim's right to recover from a forger or fraudster is clear cut, but most perpetrators do

47. See Press Release, Dist. Att'y Kings Cnty., Brooklyn Attorney Indicted for Real Estate Fraud in Connection with Eight Properties Valued at Nearly \$8 Million (Dec. 7, 2020), <https://perma.cc/9K5G-J4K4>.

48. See *id.* (“The defendant allegedly collected over \$600,000 in rent from tenants he brought in or existing tenants at the eight properties the victims transferred to him. As record owner, if any of the properties were to be sold, the defendant would also benefit from the increase in value accrued over the last several years.”).

49. See *supra* note 45 and accompanying text.

50. See *infra* note 51 and accompanying text.

51. See *Examples of Mortgage/Foreclosure Fraud and Loan Modification Scams*, NEV. ATT'Y GEN., <https://perma.cc/M227-4D3D> (discussing Bait and Switch and other foreclosure rescue scams).

52. See *id.*

In this scam, the homeowner is deceived into signing over the title with the belief that he/she will be able to remain in the house as a renter and eventually buy it back over time. The terms of these scams are so onerous that the buy-back may be impossible, the homeowner loses possession, and the “rescuer” walks off with most or all of the equity.

not hold on to the property for long; they cash in by transferring title or borrowing money from third parties who may not know of the wrongdoing, and who may claim protection as good faith purchasers.⁵³ This Part explores the rights of victims against third parties, and then turns to the effectiveness of civil and criminal sanctions as a deterrent to title theft.⁵⁴

A. *Forgery*

Courts typically treat a forged deed as a nullity, ineffective to create any rights in parties whose interests are dependent on the deed, even if those parties did not participate in the forgery. *Aurora Loan Services, LLC v. Veatch*⁵⁵ illustrates the general principle. Elsie Veatch owned the subject property until her death in 1974; her son and only heir died in 2006. Within months of the son's death, two forged deeds were recorded: one purportedly executed by Elsie 32 years after her death and the other, styled an "executor's deed," purportedly executed by the son on a date on which he was lying in a coma. Both deeds purported to transfer the property to Antonia Simpson. Simpson in turn transferred the property to Daryl Mathews, who recorded that deed. Mathews then borrowed \$187,000 from First Morgan Financial on the strength of a security deed to the property. First Morgan then assigned the deed to Aurora. When Elsie Veatch's grandson discovered activity on the property, he brought a quiet title action seeking to extinguish any interest Aurora might have on the property. In holding that Veatch's estate had fee simple title unencumbered by Aurora's security deed, the court emphasized that the deeds on which the security deed was premised were nullities, so that even if Aurora had no knowledge of the forgeries, Aurora could gain no interest premised on those deeds.

Even when the deed itself is not forged, but the deed is executed by a person holding a forged power of attorney, the deed is void and subsequent purchasers who relied on the deed acquire no interest in the property. For instance, in *ABN Amro Mortgage Group, Inc. v. Stephens*,⁵⁶ the notary who witnessed

53. See *infra* Part II.

54. See *infra* Part II.

55. 710 S.E.2d 744 (Ga. 2011).

56. 939 N.Y.S.2d 70 (2012).

execution of a power of attorney testified that the person supposedly executing the power of attorney was in her 40s while evidence established that the actual principal had previously relocated to South Carolina at the age of 77.⁵⁷ The holder of the forged power of attorney then executed a deed to the subject property, and a subsequent transferee obtained a mortgage on the property.⁵⁸ In concluding that the mortgage was invalid, the court held that because the power of attorney was forged, any documents executed by the forger were void, and subsequent bona fide purchasers or encumbrancers for value received nothing.⁵⁹

Moreover, the New York Court of Appeals has held that forgery claims are not subject to the statute of limitations. In *Faison v. Lewis*,⁶⁰ the court held that the statute did not bar an effort by the administrator of a deceased co-owner to cancel a mortgage based on a deed forged by the other co-owner more than six years before the administrator sought cancellation.⁶¹

The upshot is that legal doctrine protects the property interests of owners who can prove they were victimized by forgery. At first glance, it appears that this protection comes at the expense of another class of innocent parties: bona fide subsequent purchasers and mortgagees. Appearances, however, can be deceiving. Those purchasers or mortgagees would be protected by a standard title insurance policy because the title defects were in existence at the time they purchased or encumbered the property.⁶² In other words, the rule that a forged deed is a nullity effectively spreads the loss associated

57. *See id.* at 71–72.

58. *Id.*

59. *See id.* at 72 (“If a signature on a power of attorney is forged, any document executed by the purported attorney-in-fact pursuant to the power of attorney is void.”).

60. 32 N.E.3d 400 (N.Y. 2015).

61. *See id.* at 407 (“[A] statute of limitations cannot validate what is void at its inception. Therefore, a void deed is not subject to a statutory time bar.”).

62. Exclusion 3(d) of the American Land Title Association (ALTA) Standard Policy excludes liability for all defects or adverse claims “attaching or created subsequent to the Date of Policy.” *Policy Forms*, AM. LAND TITLE ASS’N STANDARD HOMEOWNER’S POL’Y, <https://perma.cc/6UVG-ZDDE> (last visited Oct. 30, 2023) (click “2021 ALTA Policy Forms Collection – Base Forms” to drop down tab; then click “ALTA Loan Policy” to open document; in document, go to “Exclusions from Coverage”).

with forgery among all subsequent purchasers who buy title insurance—except in the rare circumstances where a purchaser or mortgagee chooses to forgo purchase of title insurance.⁶³

B. *Fraud*

When a wrongdoer procures a deed by fraud rather than forgery, the legal consequences depend on the nature of the fraud. “Fraud in the inducement” renders a deed voidable and protects the interest of bona fide purchasers or encumbrances who have relied on the fraudulently procured deed.⁶⁴ By contrast, “fraud in the factum” renders the deed void and, like forgery, privileges the interests of original owners over those of subsequent purchasers.⁶⁵

Fraud in the inducement claims are those in which the fraudster has obtained the owner’s signature by false pretenses. For instance, in *Deutsche Bank Trust Company Americas v. Samora*,⁶⁶ the property owner, who had fallen behind on her mortgage, signed a warranty deed to the property based on a fraudster’s representation that the deed was necessary to obtain refinancing of her home.⁶⁷ Although the representation was false, the owner knew that the document she was signing was a deed.⁶⁸ As a result, a lender who relied on the deed in good faith was entitled to foreclose on the property.⁶⁹

63. Institutional lenders typically require home purchasers to buy title insurance protecting the lender. Buyers can then buy an owner’s policy at a discounted price and lawyers frequently recommend purchase of that policy. See Sterk, *supra* note 26, at 524–27 (describing ascendency of title insurance in the United States).

64. See, e.g., *Svanidze v. Kirkendall*, 169 P.3d 262, 266 (Colo. App. 2007) (claiming unless deed was product of fraud in the factum, deed is merely voidable); *Missouri v. MWG Prop. Consultants, LLC*, No. 273906, 2008 WL 2389489, at *3 (Mich. Ct. App. June 12, 2008) (“Fraud in the inducement does not render a contract void, but merely voidable at the election of the defrauded party.”).

65. See, e.g., *Evertson v. Sibley*, 520 P.3d 157, 165 (Alaska 2022) (noting allegation of fraud in the factum survives summary judgment despite bank’s bona fide lender status).

66. 321 P.3d 590 (Colo. App. 2005).

67. *Id.* at 593–94.

68. *Id.*

69. *Id.* at 594.

If, however, the wrongdoer places a document in front of the property owner, who signs it without realizing that it is a deed, the fraud constitutes fraud in the factum and the resulting deed confers no rights on subsequent bona fide purchasers.⁷⁰ So, if the owner lacked capacity at the time of execution, or if the owner was led to believe that the document was a loan agreement rather than a deed, the owner is entitled to recover the property even against subsequent bona fide purchasers.⁷¹

Although the legal distinction may be clear, determining whether fraud was in the inducement or in the factum will often raise fact questions that turn on the property owner's credibility. Proving that the owner knew the document she signed was a deed may be no easy matter. And, indeed, many of the appellate cases articulating the doctrinal rules involve denials of summary judgment, leaving the parties (and the trial courts) to do the hard fact-finding work.⁷²

When the fraud is perpetrated on a property owner who lives on the disputed property, the difference between fraud in the factum and fraud in the inducement may not matter much because of the established rule that a property purchaser is on inquiry notice of the rights of persons in possession.⁷³ As a result, a purchaser or a lender who acquires an interest in a home occupied by a fraud victim would not enjoy bona fide purchaser status. *Martinez v. Affordable Housing Network*,

70. Some states will reject a fraud in the factum claim if the alleged victim was negligent in signing a document, he or she did not realize was a deed. *See, e.g.*, *Shappy v. Downcity Cap. Partners, Ltd.*, 973 A.2d 40, 46 (R.I. 2009) (holding that defendant was entitled to summary judgment because plaintiff negligently signed the deed). The Restatement (Second) of Contracts takes a similar position with respect to misrepresentations that would make a contract void: the contract is void if the person who signs “neither knows nor has reasonable opportunity to know of the character of essential terms of the proposed contract.” RESTATEMENT (SECOND) OF CONTRACTS § 163, cmt. c.

71. *See Evertson*, 520 P.3d at 166 (concluding that plaintiff survives summary judgment claim because plaintiff's diminished mental capacity was a factor that, if proven, is consistent with the defendant obtaining a quitclaim deed by fraud).

72. *See, e.g.*, *Casonhua v. Wash. Mut. Bank*, Nos. B218606, B218608, 2010 WL 4193214, at *11 (Cal. App. 2010) (denying summary judgment); *Delsas v. Centex Home Equity Co., LLC*, 186 P.3d 141, 147 (Colo. App. 2008) (denying summary judgment).

73. *See, e.g.*, *Martinez v. Affordable Hous. Network, Inc.*, 123 P.3d 1201, 1201 (Colo. 2005).

*Inc.*⁷⁴ illustrates the point.⁷⁵ An entity offering counseling services to homeowners who were delinquent on mortgage payments induced Martinez to execute a quitclaim deed to his home, which was to be placed in escrow.⁷⁶ In violation of the parties' agreement, the entity did not place the deed into escrow, and instead conveyed the property, via quitclaim deed, to a third party.⁷⁷ Rejecting the third party's claim to protection as a bona fide purchaser, the Colorado Supreme Court held that because Martinez was in physical possession the purchaser was on inquiry notice that the deed was fraudulently procured.⁷⁸

By holding the third-party purchaser on inquiry notice of the fraud, the court ensured that the loss would fall on the party in the best position to protect himself through the purchase of title insurance. The two quitclaim deeds in the case – one from Martinez to the “counseling service” and the second from the service to the purchaser – would in most circumstances lead a purchaser to seek the protection afforded by title insurance, and if the purchaser needed to finance the purchase, any institutional lender would almost certainly require purchase of title insurance. Prioritizing the rights of fraud victims against subsequent purchasers and mortgagees ensures, in general terms, that most losses suffered by good faith purchasers will be covered by title insurance.

C. *Criminal Penalties*

Although penal statutes vary from state to state, forging a deed is a crime virtually everywhere.⁷⁹ Similarly, states invariably criminalize theft of property by defrauding its owner.⁸⁰ Prosecutors have used existing criminal statutes against

74. *Id.*

75. *See id.* at 1203–05.

76. *Id.*

77. *Id.*

78. *Id.*

79. *See, e.g.*, MODEL PENAL CODE § 224; CAL. PENAL CODE § 470; TEX. PENAL CODE § 32.21; N.Y. PENAL LAW § 170.10.

80. *See, e.g.*, MODEL PENAL CODE § 223.3 (“Theft by Deception”); CAL. PENAL CODE § 532 (obtaining money, labor, or property by false pretenses); TEX. PENAL CODE § 3 2.46 (fraudulent securing of document execution); N.Y. PENAL LAW § 155.05 (larceny includes obtaining property by false pretenses).

forgers and fraudsters who have attempted to profit from real property they do not own.⁸¹

III. REFORM PROPOSALS

Existing doctrine provides homeowners victimized by forgery or fraud with legal recourse and imposes criminal penalties on perpetrators. Nevertheless, title theft persists. Owners continue to suffer the emotional distress associated with the apparent loss of their properties. More concretely, title theft victims, often people of modest means, do not have the resources to bring the legal proceedings necessary to restore their rights. A number of reform proposals have emerged, most of them aimed at deterring fraud and forgery rather than easing the financial burdens suffered by victims. This Part surveys these proposals and explains why most are likely to prove ineffective or misguided.

A. *Notice of Deed Recording*

A number of jurisdictions have initiated programs enabling property owners to request notice of deeds or mortgages recorded with respect to their properties.⁸² These programs operate on the assumption that knowledge is power; if an owner knows of a problematic deed recording, the owner will be able to take prompt protective action. In practice, however, these notice provisions are unlikely to be of significant value.

81. See, e.g., Grand Jury, *supra* note 36, at 27 (noting that grand jury has charged wrongdoers with Criminal Possession of a Forged Instrument and Offering a False Instrument for Filing); *8 Charged in 'Wide-Ranging' Deed Theft Conspiracy, Officials Announce*, FOX 29 PHILA. (Jan. 10, 2022), <https://perma.cc/J49R-42QY> (noting that charges include forgery, theft by deception, and conspiracy, among other charges).

82. To take a few examples, New York City has implemented the ACRIS Notice of Recorded Document System. See *Automated City Register Information System, Notice of Recorded Document*, N.Y.C. DEP'T FINANCE: OFF. CITY REG., <https://perma.cc/7K9W-TANF> (last visited Oct. 30, 2023). Philadelphia offers "Deed Fraud Guard" protection to those who register. See *Sign Up for Deed Fraud Protection*, CITY OF PHILADELPHIA, <https://perma.cc/V29L-8ZNM> (last visited Oct. 30, 2023). Dallas has implemented a Property Fraud Alert system. See *Property Fraud Alert*, DALLAS CTY., <https://perma.cc/H58Z-FE2J> (last visited Oct. 30, 2023).

First, most of the programs require an affirmative action by a property owner to opt into the program.⁸³ This feature is understandable. Without an indication from the owner about where notice should be sent, local officials would be at a loss, especially with respect to vacant properties or those that are not owner-occupied—the very properties forgers most frequently target. However, most owners, especially those who are less sophisticated, will not know to opt into the program, reducing its effectiveness.⁸⁴

Second, assuming an owner receives notice of a suspicious recorded deed, what action will the owner take? The owner might hire a lawyer to bring a quiet title action, or to cancel the deed, but that will involve considerable expense. Moreover, it does not take long for a fraudster to execute a deed or mortgage to a purchaser who may not know of the fraud.⁸⁵ Unless notice is virtually instantaneous, even an energetic and sophisticated owner is unlikely to be able to act quickly enough to prevent such a transfer.

Third, recall that many of the forgeries arise when the prior owner has died. A requirement that the record owner be notified

83. See, e.g., *GovOS Property Alerts*, CTY. OF DALLAS, <https://perma.cc/TEN3-N4HK> (last visited Oct. 30, 2023) (Dallas procedures for registering for property alerts); *Sign Up for Deed Fraud Protection*, CITY OF PHILADELPHIA, <https://perma.cc/V29L-8ZNM> (last visited Oct. 30, 2023) (Philadelphia procedures for registering property alerts). New York City is an exception. The recording statute requires recording officers to mail a notice of recorded conveyances of residential property to the owner of record. N.Y. Real Prop. Law § 291 (McKinney 2023). New York City's administrative code requires its Department of Finance to maintain a system that provides interested parties with notice and includes an opt-out provision. See N.Y.C. Admin. Code § 7-628. In implementing the code, however, the Department of Finance requires registration by owners interested in obtaining reports of deeds. See *Automated City Register Information System, Notice of Recorded Document*, N.Y. DEP'T FINANCE: OFF. CITY REG., <https://perma.cc/7K9W-TANF> (last visited Oct. 30, 2023).

84. The sign-up rates for these programs is low. The Dallas County Clerk has reported that only 1% of owners have signed up for the county's free service. In Collin County, Texas, the sign-up rate is 3.5%. See Dave Lieber, *As Ken Paxton Probes Home Title Lock, Here's How You Can Get Title Protection for Free*, DALL. MORNING NEWS (Mar. 23, 2023), <https://perma.cc/ED9Q-VZ2V>.

85. For instance, in *Martinez v. Affordable Housing Network, Inc.*, 123 P.3d 1201, 1204 (Colo. 2005), the fraudster recorded a deed obtained from the owner based on false pretenses on May 8, and quitclaimed the deed to a supposed bona fide purchaser the following day.

of recorded deeds will provide no protection to heirs or estate administrators who are not listed as record owners of the property. These requirements are largely irrelevant with respect to fraud claims, where the owner knows that she signed documents – even deeds – but does not understand their legal consequences.

B. *Reforming Notarial Procedures*

To be recorded, a deed must contain the notarized signature of the transferor.⁸⁶ A number of the cases of title theft have involved improper notarization: the person who appeared before the notary was an imposter,⁸⁷ or the notary's signature was forged,⁸⁸ or the person who acknowledged the signature was not, in fact, a notary.⁸⁹ In light of these difficulties, a number of proposals have emerged for tightening up the notarial process as a mechanism for reducing the incidence of title theft.

At the federal level, two Congressmen introduced what they have called “the Good DEED Act”⁹⁰ which, if enacted, would make \$10,000,000 each year in grants to be distributed among states and municipalities to be used for a variety of purposes directed at increasing public awareness of deed fraud and assisting its victims.⁹¹ As a condition for funding, however, the state or locality would have to require notaries who keep a written journal to take fingerprints of the persons who sign deeds, while requiring notaries who keep an electronic journal to save a photo or video of the signer.⁹² If the state authorizes remote notarization, the state would have to require remote notaries to submit an audio and visual recording to a state-

86. See generally PATTON AND PALOMAR ON LAND TITLES § 356 (3d ed. 2021) (noting that acknowledgments are generally required in order to make deeds eligible for recording).

87. See Perry, *supra* note 1.

88. See ‘Forged My Name’: Fake Notary Stamp, Signatures Behind Philly Stolen Deeds, NBC10 PHILA. (Nov. 16, 2019), <https://perma.cc/NKW9-YGDG> (discussing instances of notary forgery in Philadelphia).

89. See Shannon Behnken, *Dunedin Man Discovers His House Was Stolen Through Deed Fraud*, WFLA NEWS CHANNEL 8 (Feb. 23, 2023), <https://perma.cc/LET2-ULSK> (discussing an instance of deed fraud in Florida).

90. H.R. 9192, 117th Cong. (2022).

91. *Id.*

92. *Id.* § 2(b)(3).

approved repository, which would maintain the recording for at least 10 years.⁹³

At the state level, an investigative grand jury empaneled by the New York County District Attorney recommended a requirement that notaries file an official bond that would provide funds to pay claims arising out of misconduct, a requirement that notaries purchase a notary seal, and a requirement that notaries maintain a detailed journal of all notarial acts.⁹⁴

Notaries serve many functions other than witnessing signatures on real estate deeds. Notaries witness powers of attorney.⁹⁵ They witness affidavits required for a variety of purposes, including self-proving affidavits that allow wills to be admitted to probate without forcing the witnesses to appear in court.⁹⁶ Notarization is a low-cost alternative to judicial proceedings. Most states impose statutory maximums on the prices notaries can charge – sometimes as little as two dollars for notarizing a signature.⁹⁷ Imposing additional costs on notaries – either in money (providing a bond) or in time (maintaining a detailed journal) will reduce the supply of persons willing to serve as notaries, or will require an increase in statutory fees, ultimately increasing the cost to consumers.

Reforms to the notarial process may be worth the cost if they make funds available to victims of forgery, or if they deter misconduct. Of the proposed notarization reforms, only posting a bond would make more funds available to victims. As the New

93. *Id.* § 2(b)(4).

94. *See* GRAND JURY, *supra* note 36, at 13–20.

95. The Uniform Power of Attorney Act does not require notarization for a power to be valid, but the statute does provide that “A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.” UNIF. POWER ATTY ACT, § 105 (UNIF. L. COMM’N 2006).

96. *See* Bruce Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1034, 1045 (1994). The Uniform Probate Code now authorizes notarization as an alternative to the usual formality requiring two witnesses; Lawrence W. Waggoner, *The UPC Authorizes Notarized Wills*, 34 ACTEC L. J. 83 (2008).

97. *See* N.Y. EXECUTIVE LAW § 136 (Two-dollar fee for taking and certifying the acknowledgment or proof of execution of a written instrument). Most states have fee schedules with somewhat higher fees, ranging up to \$15, while some states have no statutory fees. *See* National Notary Association, *2023 Notary Fees by State*, <https://perma.cc/Y996-QBUY>.

York grand jury observed, a majority of states require notaries to be bonded.⁹⁸ Bonding could potentially cover attorney's fees for owners when notarial misconduct generated attorney's fees and other expenses necessary to clear title. Bonding, however, would be of little value when wrongdoers invent a notary and manufacture a seal for the imposter.

Requiring seals, fingerprints, and detailed journals would do nothing to generate funds to compensate forgery victims and will have marginal value in deterring deed theft. Requiring notaries to maintain journals is unlikely to deter the forger who presents false identification to the notary. Fingerprints may deter a few forgers whose fingerprints are already on record, but not others.⁹⁹ Nor are these requirements likely to deter forgers who rely on fake notaries to acknowledge deeds; those fingerprints and journals will never see the light of day. And given the ease with which a seal can be manufactured to order, a seal requirement also seems unlikely to deter wrongdoers.

Finally, even if notarization reform might marginally deter forgery, it will have no impact on deed theft through fraud, where the victim willingly signs documents that the victim believes will protect property from foreclosure. In these cases, the victim presents the notary with accurate identification information; the notary has no reason to know of the fraud.

C. *Limiting Access to the Recording System*

Other recommendations for combating deed theft focus on making it harder for potential forgers to use existing recorded data to fabricate plausible deeds to targeted properties.¹⁰⁰ Unlike the English Land Registry Act, which limits the inspection of title records to persons who have the permission of

98. See GRAND JURY, *supra* note 36, at 16.

99. Precisely what operates to deter wrongdoers is a matter of considerable debate in the criminal law literature, although there is some agreement that the likelihood of punishment may have a more significant impact on deterrence than the intensity of punishment. See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L. J. 949, 977 (2003). If fingerprinting significantly increases the likelihood of detection, it may have a deterrent effect.

100. See *id.* at 21–22 (suggesting redaction of data from publicly available records).

the registered title holder,¹⁰¹ recorded deeds in the United States have historically been available to the public at large.¹⁰² Transparency of title records is critical for a system in which no government entity maintains definitive information about the state of title.¹⁰³ Widespread digitization of title records has made public access much easier; no longer does a title searcher have to travel to the local recording office to inspect deeds and mortgages. But widespread public access also facilitates misuse of recorded data, including names and addresses of recorded owners.¹⁰⁴

Redacting data from recorded documents or otherwise limiting access presents significant problems. First, many municipalities derive revenue from sales of title records to firms that use the associated data for commercial purposes. In many circumstances, that revenue offsets the cost of maintaining the digitized public recording system.¹⁰⁵ Municipalities may be reluctant to part with that revenue stream.

Second, even if the municipality were willing to limit access to those with a “valid basis” for viewing a document in its entirety, determining who would qualify would not be easy. Potential lenders and potential purchasers certainly have a valid reason to inspect complete title records. If an individual states that he or she is or represents a prospective lender or purchaser how are recording office clerks to evaluate those claims? Someone planning on and capable of forging a deed or obtaining one by fraud would certainly be unphased by forging permission to inspect from the property owner. Would complete records no longer be available online, where evaluation of the searcher’s bona fides would be even more difficult? Limiting the

101. Land Registration Act 1925, 15 & 16 Geo. 5, c. 21, § 112 (Eng.) (“[A]ny person registered as proprietor of any land or charge, and any person authorized by any such proprietor, or by an order of the court, or by general rule, but no other person, may inspect and make copies of and extracts from any register or document in the custody of the registrar relating to such land or charge.”). The statute did make it possible for a purchaser to inspect a title record to confirm representations made by the registrant. *Id.*, § 110(1).

102. See Weisbord & Sterk, *supra* note 28, at 516 (describing the American deed recording system).

103. *Id.* at 515–16.

104. See *id.* at 509–13, 528–36 (noting the problems and implications of public access to deeds, titles, and mortgages).

105. *Id.* at 525–28.

ability to search records online would generate cost and inconvenience for the many legitimate users of title records.

D. *Targeted Criminal Penalties*

Nevertheless, some have argued that existing prohibitions are inadequate.¹⁰⁶ In particular, the New York State Attorney General has championed a bill, introduced in the state legislature, that would explicitly make “Deed Theft” a crime.¹⁰⁷ The proposed bill provides that “Deed theft” is committed by a person who (a) forges property documents with an intent to defraud or unlawfully transfer property; or (b) with intent to defraud, misrepresents themselves as an owner or authorized representative in order to induce potential buyers to take ownership or possession; or (c) with intent to defraud “takes, obtains, steals, or transfers title or ownership of real property by fraud, larceny, or any other fraudulent or deceptive practice.”¹⁰⁸ The proposed crime is then divided into degrees based on the nature or the property involved reflecting the apparent belief that forging deeds of residential property is more serious than forging deeds of commercial property.¹⁰⁹

106. *Id.*

107. See Press Release, N.Y. Att’y Gen., Attorney General James Takes Action to Protect New Yorkers’ Homes and Combat Deed Theft (Apr. 27, 2023), <https://perma.cc/23BW-HF2Q>.

108. Section 162(1) of the proposed Penal Law section provides:

“Deed theft” is committed by a person who,
 (a) intentionally alters, falsifies, forges, or misrepresents property documents such as a residential or commercial deed or title, with the intent to deceive, defraud or unlawfully transfer or encumber the ownership rights of a residential or commercial property; or
 (b) with intent to defraud, misrepresents themselves as the owner or authorized representative of residential or commercial real property to induce others to rely on such false information in order to obtain ownership or possession of such real property; or
 (c) with intent to defraud, takes, obtains, steals, or transfers title or ownership of real property by fraud, forgery, larceny, or any other fraudulent or deceptive practice.

S. B. 6569A, 2023–24 Reg. Sess. (N.Y. 2024).

109. For instance, deed theft of one commercial property is deed theft in the third degree, while deed theft of a residential property occupied as a home is deed theft in the first degree. See *id.* (comparing § 162.05 with § 162.15).

Because forgery of a deed is already a crime in New York, the proposed bill's major impact is to increase the penalties facing wrongdoers.¹¹⁰ The increased deterrence is likely more theoretical than real.¹¹¹

With respect to deed fraud, the statute's impact is unclear. The proposed statute provides that a person commits deed theft when, with the requisite intent, the person "takes, obtains, steals, or transfers title of ownership of real property" by prohibited means.¹¹² Under existing property law, however, a deed induced by fraud is voidable.¹¹³ If the original owner of the property could obtain a judgment that the fraudulently procured deed did not bind the owner, has the fraudster taken, obtained, stolen, or transferred title? The fraudster might have a defense that the property was never stolen.

Perhaps the most important point is that those who engage in deed fraud or forgery are not likely to parse the state's penal code to determine which section of the state's penal code criminalizes their behavior. They know they are engaging in criminal activity. If the criminal law has the potential to deter forgers and fraudsters, it will do so by increasing penalties for existing crimes, not by defining new ones.

E. *Delaying Access to Judicial Process*

Recently, the New York legislature enacted legislation to slow the process by which scammers can use the courts to obtain possession or title. The new statute, effective December 2023, requires courts to stay proceedings to recover possession or to quiet title when a government agency demonstrates the

110. For instance, under existing New York law, forgery of a deed is a Class D Felony. N.Y. PENAL LAW § 170.10. Class D Felonies are punishable by imprisonment not to exceed seven years. N.Y. PENAL LAW § 70.10. The proposal would make Deed Theft in the Second Degree a Class C Felony (punishable by up to 15 years) and Deed Theft in the First Degree a Class B Felony (punishable by up to 25 years). S. B. 6569A, 2023–24 Reg. Sess. (N.Y. 2024).

111. See Robinson & Darley, *supra* note 99, at 953 (noting the social science literature suggestions that potential offenders commonly do not know the law or perceive an expected cost of a violation).

112. See *supra* note 107.

113. See *Faison v. Lewis*, 25 N.Y.3d 220, 224 (2015).

pendency of a good faith investigation into title theft or title fraud.¹¹⁴

However well-intentioned, legislation focused on limiting access to judicial process is unlikely to have a meaningful effect on title theft. First, scammers often have no need to resort to the court system; they can make their money by transferring title to purchasers who did not participate in the scam. Second, the New York legislation applies only when a government agency has already identified a potential title theft. But even absent legislation, a court apprised of a government investigation or a criminal charge would be unlikely to issue a judgment quieting title or awarding possession to the target of the government action.

IV. INSURANCE AS A SOLUTION

Even were some or all of the foregoing proposals adopted, and even if they had an effect, they would not eliminate title theft altogether. Yet few of the proposed reforms would provide any compensation to victims for the losses fraud and forgery inflict—primarily the legal costs and delays attendant to claiming title, and, in some fraud cases, the loss of the property to bona fide purchasers. These losses are significant but rare. Insurance is a natural candidate for guarding against losses like these. This Part explores the feasibility of insurance to cover fraud and forgery losses, discusses existing private market offerings, and suggests that expanded title insurance may offer the best alternative for covering and to some extent preventing these losses.

A. *Insurance and Its Obstacles*

Insurance often provides an optimal vehicle for spreading remote risks among the parties potentially affected by the risks.¹¹⁵ A private insurance market will not develop, however,

114. N.Y. Real Prop. Law § 756(a)(1) (McKinney 2023). The statute also provides for a stay when a charging instrument has been filed against a party to a proceeding to recover possession or to quiet title. *Id.* at § 756(a)(2).

115. See, e.g., Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1185 (1981) (noting that insurance is a tool for distributing risk among groups of risk bearers).

unless potential victims perceive a risk significant enough to warrant paying the premiums an insurer would charge.¹¹⁶ And insurers will not enter a market unless premiums would be large enough to cover the possibility that the risks ripen into losses, the cost of administering the insurance scheme, and a reasonable profit.¹¹⁷

When too few potential insureds perceive a risk as significant, an insurance market may not develop because the administrative cost per insured would be prohibitive.¹¹⁸ To avoid that problem, insurers frequently bundle coverage for a variety of perils.¹¹⁹ For instance, by bundling coverage for fire, theft, storm damage and other potential losses into a comprehensive homeowners insurance policy, insurers capture buyers who might not otherwise perceive and protect against one of those individually remote risks. By increasing the size of the insurance market in this way, insurers reduce the per-customer administrative costs.¹²⁰

Adverse selection and moral hazard can also serve as obstacles to establishment of an insurance market. Adverse selection arises when potential customers have better

116. See Howard Kunreuther & Mark Pauly, *Rules Rather than Discretion: Lessons from Hurricane Katrina*, 33 J. RISK & UNCERTAINTY 101, 105 (2006) (noting that potential hazard victims do not even seek out information on probabilities for low probability events, and therefore do not consider purchasing insurance).

117. See Howard C. Kunreuther & Erwann O. Michel-Kerjann, *Climate Change, Insurability of Large-Scale Disasters, and the Emerging Liability Challenge*, 155 U. PA. L. REV. 1795, 1810 (2007) (noting that in some cases insurance market does not develop because of insufficient demand to cover development, marketing, operating, and claims processing costs); see also Howard Kunreuther & Erwann O. Michel-Kerjann, *The Development of New Catastrophe Risk Markets*, 1 ANN. REV. RES. ECON. 119, 124 (2009) (noting that for some insurable events, insurance will not be profitable because of insufficient demand).

118. See *supra* note 117.

119. See *Bundling*, NAT'L ASS'N INS. COMM'RS, <https://perma.cc/M684-VRFJ> (last updated Oct. 22, 2023) ("Consumers may prefer bundling because policies and bills are easier to manage, which can make consumers stay with one company longer for the convenience.").

120. See *id.* (describing how bundling makes policies easier to manage for insurers).

information about the risks they face than insurers do.¹²¹ In that situation, if insurers set premiums at a level designed to cover average risk, customers who know they are at higher risk will purchase insurance at higher rates than those who face lower risk, threatening the solvency of the insurance scheme.¹²² If insurers raise premiums still more, low risk consumers will defect.¹²³

Moral hazard arises when an insured fails to take steps that might avoid losses because the existence of insurance reduces or limits the insured's incentive to guard against risk.¹²⁴ If the insurer prices premiums to account for moral hazard, more potential purchasers will forgo insurance (and perhaps take inefficient protective measures).¹²⁵

Adverse selection is unlikely to be a factor that precludes creation of a market to insure against real estate forgery and fraud.¹²⁶ Those at highest risk of forgery or fraud are unlikely to perceive risks better than potential insurers. Similarly, moral hazard is not a problem with forged deeds; an owner can do little to prevent others from forging her deeds. But moral hazard arguably does arise with respect to fraud: if an owner knows her losses will be covered by insurance, the owner might theoretically be less inclined to read documents carefully before signing them and less likely to investigate the bona fides of those purporting to help the owner out of financial distress. In practice, however, the owners most susceptible to fraud are unlikely to be aware either of the risk of fraud or of the coverage insurance might provide. Their behavior, therefore, will not be influenced by the existence of insurance.

By far the biggest problem facing development of comprehensive insurance coverage is the lack of widespread

121. See Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 596 (1984) (discussing the adverse selection hazard problem facing insurers).

122. *Id.*

123. *Id.*

124. See *id.* at 593–94 (discussing the moral hazard problem facing insurers).

125. *Id.*

126. See *How Common is Home Title Theft in 2023?*, ALL THINGS SECURED (Feb. 2, 2023), <https://perma.cc/5FCY-WD5H> (explaining that title theft is an uncommon crime).

consumer awareness of the risks associated with deed forgery and fraud. Moreover, even among the owners aware of the possibility, few may consider the risks significant enough to insure against even if premiums are low. Some form of bundling or compulsion would be necessary to make an insurance scheme effective.

B. Current “Insurance” Offerings

A number of firms have developed products purporting to protect consumers against title theft, but the fine print of their service agreements make it clear that they provide only monitoring, not insurance, and at a substantial monthly cost.¹²⁷ Some of these firms market title theft protection as part of a package of identity theft protection¹²⁸ while others focus exclusively on title theft.¹²⁹ In some cases, the general description of services they provide includes the word “insurance,” sometimes with a cap as high as \$1 million, but the more precise language in the service agreements excludes insurance coverage for title theft.¹³⁰

In a number of states, public officials have warned homeowners that these services are unnecessary because the

127. For instance, Identity Guard advertises that “Home title theft is identify theft” and “Home title insurance alone won’t protect you.” *See How Thieves Take Your Title*, IDENTITY GUARD, <https://perma.cc/425Q-SP87>. The plans are priced from \$5.39 to \$17.99 per month. *See Choose the Identity Theft Protection Plan That Fits Your Needs*, IDENTITY GUARD, <https://perma.cc/AZ4L-A689>. But the Aura Identity Guard License and Terms of Use (updated July 10, 2022) provide in Section 3.7 that “Our Additional Title Monitoring is offered as a notice-only services and Additional Title Monitoring does not include any Identity Theft Remediation Services . . . or identity theft event insurance . . .” *See License and Terms of Use*, IDENTITY GUARD, <https://perma.cc/8572-7G5T>.

128. For example, Aura advertises “All-in-One Digital Safety for the Whole Family,” and includes “Home and Auto Title Monitoring.” *See generally Identity Theft Isn’t Cheap*, IDENTITY GUARD, <https://perma.cc/5D4K-P9WM>.

129. For example, Home Title Lock focuses on property fraud. *See The Ultimate Home Title Protection*, HOME TITLE LOCK, <https://perma.cc/6YSR-ZDKW> (last visited Nov. 3, 2023).

130. For instance, Aura advertises \$1 Million Identity Theft Insurance as “What’s Included” in its service. *See supra* note 128. Its terms of service, Section 3.7, makes it clear that its deed protection is a notice-only service. *See Aura License and Terms of Service*, AURA (Sept. 1, 2023), <https://perma.cc/C8LT-LXFH>.

government provides similar notification of suspicious deeds for free to those owners who enroll in the program.¹³¹ The Texas Attorney General has gone one step further, launching an investigation of one firm – Home Title Lock – for potentially violating the state’s deceptive trade practice act by misleading consumers about the prevalence of title theft and the need for the company’s services.¹³² City attorneys in San Francisco and San Diego have issued subpoenas seeking more information from Home Title Lock about its allegedly deceptive advertising.¹³³

Whether the claims are deceptive or not, one thing seems clear: these existing offerings do not provide financial protection to owners concerned about title theft.

C. *Expanding the Scope of Title Insurance*

Title insurance is ubiquitous in American real estate transactions. Mortgage lenders almost universally insist that a purchaser pay for title insurance that protects the lender’s interest.¹³⁴ For a reduced fee, the purchaser who pays for the lender’s policy can also buy an owner’s policy that protects the owner’s title for as long as the owner retains the property.¹³⁵

131. See, e.g., *Consumer Advisory: What is Home Title Lock Insurance, and Do You Really Need It?*, MD. OFF. ATT’Y GEN., <https://perma.cc/HNH4-6JJS> (discussing necessity of obtaining home title lock insurance).

132. See OFF. TEX. ATT’Y GEN., CONSUMER PROT. DIV., CMRRR#7016356000084568777, CIVIL INVESTIGATIVE DEMAND (2022), <https://perma.cc/5QT3-G93H> (PDF).

133. See *SF City Attorney Chiu Subpoenas Home Title Lock Over Alleged Deceptive Advertising*, CBS BAY AREA (Apr. 10, 2023), <https://perma.cc/JML3-779A>.

134. See Thomas A. Hemphill, *The Title Insurance Industry: Infusing Innovation and Competition*, 54 BUS. ECON. 177, 177 (2019) (noting that nearly all lenders require buyers to purchase a lender’s title insurance policy). See also JOYCE D. PALOMAR, 1 TITLE INS. L. § 1.3 (2020 ed.) (noting that majority of lenders require title insurance). Institutional lenders typically insist on title insurance because participants in the secondary mortgage market demands that residential mortgages be backed by title insurance. See Robin Paul Malloy & Mark Klapow, *Attorney Malpractice for Failure to Require Fee Owner’s Title Insurance in a Residential Real Estate Transaction*, 74 ST. JOHN’S L. REV. 407, 442 (2000).

135. The owner’s policy is offered at a modest discount when the owner has purchased a lender’s policy. See generally Sterk, *supra* note 26, at 535.

Title insurance is an ideal vehicle for spreading the risk associated with title theft, and even for reducing that risk. Property owners are the class of people at risk of title theft. At the same time, virtually all property owners have, or could have title insurance. Because of the identity between the group of potential victims and the group of title insurance purchasers, a well-designed title insurance system could spread the cost of title theft – largely the cost of counsel – among the parties susceptible to the risk. Moreover, coverage of these risks through title insurance might also help reduce the risk. Because title insurers regularly check recent recordings to keep their records up-to-date,¹³⁶ they are in a unique position to monitor questionable recordings. Giving them a financial incentive to monitor has some potential to smoke out forged or fraudulent deeds at an early stage.

As currently structured, title insurance protects some, but not all, homeowners against the costs imposed by title theft. Title insurance companies typically use form policies drafted by a trade association, the American Land Title Association (ALTA). A home purchaser can buy one of two of ALTA's title insurance policies – a standard owner's policy, or a homeowner's policy (often referred to as an enhanced policy).

The standard title insurance policy protects one class of victims of title theft: subsequent purchasers or mortgagees who buy from, or lend to, forgers, fraudsters, or their collaborators.¹³⁷ If these purchasers or lenders bought the standard policy, the title insurer will be required to indemnify them for losses arising from challenges to their title, and to pay the costs and attorney's fees incurred in defending that title.

However, the standard policy does not protect a purchaser against forgeries that occur after the date the policy was issued. That exclusion from coverage is consistent with the basic structure of current title insurance; unlike most other insurance, which is premised on the advantages of spreading risks that might eventuate during the policy period, title insurance is designed to eliminate risk rather than spreading

136. See Joyce D. Palomar, *Bank Control of Title Insurance Companies: Perils to the Public That Bank Regulators Have Ignored*, 44 SW. L.J. 905, 930 (1990) (discussing daily "take-offs" by title insurers).

137. See *supra* note 127.

it.¹³⁸ Before issuing a title policy, the insurer or its agent conducts a title search to make sure the purchaser's title is clear. If the search reveals defects, the insurer will not issue the policy until the defect is cleared unless the purchaser or lender is willing to accept the policy with an exception for that defect.¹³⁹ The standard policy then expressly excludes from coverage any defect "attaching or created subsequent to the Date of Policy."¹⁴⁰ In other words, the insurer is insuring against any defects in its title examination, not against risks that might arise from matters outside the scope of that examination.

By contrast, the ALTA homeowner's policy – the enhanced policy – does protect purchasers against post-policy forgery (among a variety of other risks not covered by the standard policy).¹⁴¹ Owners who have purchased the enhanced policy, which comes with a higher premium, are entitled to representation if and when a person claims title based on a forged deed. But the policy does not cover post-policy losses due to fraud.¹⁴² If the owner has actually signed a deed to a fraudster, even the enhanced policy's exclusion for defects "created, suffered, assumed, or agreed to by You"¹⁴³ would apply, and would leave the owner unprotected.

The current title insurance regime, then, has three gaps in coverage of title theft.¹⁴⁴ First, none of the existing policies cover post-policy fraud. Second, owners who purchased the standard policy are not protected against post-policy forgery. Third, title insurance does not provide any protection to those who did not purchase title insurance.

Legislation requiring all title insurance to cover post-policy forgery and fraud would address the first two gaps. Title

138. Palomar, *supra* note 136 at 929.

139. See Palomar, *supra* note 134 at § 1.15.

140. *Policy Forms*, AMER. LAND TITLE ASS'N, <https://perma.cc/F3TV-AQ8X> (containing ALTA Owner's Policy of Title Insurance, Exclusion 3(d)).

141. ALTA Homeowner's Policy of Title Insurance, Exclusion 3(d), which excludes post-policy risks, provides that the exclusion does not apply to a number of risks, including post-policy forgery. Among the other enhancements are protection for structures that have to be removed because they encroach over a boundary line, as well as protection against adverse possession claims. See *id.* (making available the relevant form).

142. See *supra* note 127.

143. See *supra* note 140.

144. See *supra* note 127.

insurance is a highly regulated industry.¹⁴⁵ Regulation is justified in part because for most home purchasers, title insurance represents one of numerous closing costs at the time of purchase, not worthy of close attention to policy details. Purchasers are unlikely to make informed decisions about the relative merits of standard and enhanced policies. Moreover, title insurance purchasers cannot pick and choose which protections they want; insurers bundle protections so that a purchaser who wants protection against forgery will have to pay for the other protections included within the scope of the enhanced policy. As a result, even some educated purchasers may conclude that the enhanced policy is not worth the enhanced price. If protecting homeowners against title theft is an important goal, there is good reason to require title insurers to cover it in the standard policy.

Moreover, requiring all policies to cover post-policy forgery and fraud would have only a marginal effect on title insurer cost because the policies would only cover legal costs, and the insurer would bear no liability for title defects.¹⁴⁶ If the insured owner ultimately established forgery or fraud there would be no title defect for the insurer to cover. On the other hand, if investigation or litigation revealed that the disputed deed was not the product of forgery or fraud, the insurer would not be liable because the insured owner had conveyed title, and the policy should preclude insurer liability for acts of the owner that create title defects.¹⁴⁷

Despite the marginal increased risk associated with expanding coverage to post-policy forgery and fraud, title

145. See Sterk, *supra* note 26, at 538–50 (discussing state regulation of title insurance and the limits on federal regulation).

146. The General Counsel of the American Land Title Association, the national trade association of title insurance companies, is reported to have said that warnings about title theft make a mountain out of a molehill and are not something the average homebuyer should be worried about. See Josh Sidorowicz, *Scammers Can Steal the Title to Your Home, But It's Rare and Easily Preventable*, WTSP TAMPA (Nov. 2, 2022), <https://perma.cc/D4QG-NWLQ>. If title insurers are correct that the incidence of title theft is small, covering title theft should have an insignificant effect on title insurance rates.

147. The current ALTA Homeowner's Policy (the Enhanced Policy) excludes title defects "created, suffered, assumed, or agreed to by the Insured Claimant." See *supra* note 140 and accompanying text. To protect against fraud, one might add words such as "knowingly and voluntarily" before created. If there was no fraud, the insurer would still be protected.

insurers may attempt to collect more in premiums for that coverage than the risk would justify. Market competition is unlikely to ensure that the price of enhanced coverage is commensurate with the increased risk. First, the industry itself is not competitive; it is dominated by four companies.¹⁴⁸ Second, as already noted, consumers are unlikely to focus on the details of policy coverage. To avoid excess fees, states—most of which already engage in some form of rate regulation for title insurance¹⁴⁹—might have to limit the premiums insurers charge for expanded standard coverage.

If standard policies were required to cover post-policy forgery and fraud, the post-policy fraud language in the current expanded policy would need tweaking with respect to one item: the insurer's right to choose counsel.¹⁵⁰ Unlike the situation with most title issues, the interests of the insured and the insurer are not well aligned when the claim is one of post-policy forgery or fraud. As already noted, the insurer will not be liable regardless of the outcome of the dispute, while the outcome may be critical to the insured. As a result, a lawyer selected by the insurer might be less zealous than a forgery or fraud victim would prefer. To avoid that difficulty, the insured should be entitled to choose an independent lawyer if the insured is concerned about potential conflict.

By the same token, the insurer's liability for attorney fees generated by an independent lawyer should be capped. Otherwise, an owner with a near-frivolous fraud claim and no personal financial resources would have an incentive to pursue

148. The "Big Four" are First American Title, Old Republic, Stewart Title, and the "Fidelity Family," which includes Fidelity National, Chicago Title, and Commonwealth Title. Together those four companies, held nearly 80% of the market in 2022. No other company holds more than a 4.4% share. *See* Press Release, American Land Title Association, ALTA Reports Full-Year Q4 2022 Title Insurance Premium Volume (May 8, 2023), <https://perma.cc/B3ST-6WA8>.

149. *See* Sterk, *supra* note 26, at 544–45.

150. The ALTA Homeowner's Policy (the enhanced policy) provides:

The Company has the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those covered causes of action. The Company is not liable for and will not pay the fees of any other counsel.

See supra note 140 (referencing ALTA Homeowner's Policy of Title Insurance, Condition 5).

litigation just to delay removal from the premises. Precisely how to structure fees is beyond the scope of this article, but perhaps allowing the successful victim of forgery or fraud to recover attorneys' fees beyond the cap would create some incentive for lawyers to pursue strong claims while eschewing weaker ones.

A reconceptualization of title insurance might relieve future victims of forgery and fraud from the economic challenges of reclaiming title, but retroactive legislation would be required to cover current owners. Retroactive legislation imposing new obligations on contracting parties might ordinarily raise Contract Clause issues,¹⁵¹ but because insurance is a highly regulated industry, states might have more leeway. As the Supreme Court has observed in sustaining a state law that restricted the price a gas supplier had contracted to receive, "significant here is the fact that the parties are operating in a heavily regulated industry,"¹⁵² and "[i]n determining the effect of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past."¹⁵³ With respect to insurance, California, for instance, has required insurers to renew existing policies as a condition of continuing to do business within the state.¹⁵⁴ Especially given the marginal additional burden title insurers would face from covering legal costs incident to post-policy forgery and fraud claims, the Contract Clause is unlikely to bar retroactive legislation.¹⁵⁵

151. U.S. CONST. art. 1, § 10, cl. 1; *see also* *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 32 (1977) (invalidating New Jersey statute repealing a covenant between two states limiting the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation).

152. *Energy Reserves Grp., Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 413 (1983).

153. *Id.* The Court went on to quote *Veix v. Sixth Ward Building & Loan Association*, 310 U.S. 32, 38 (1940), for the proposition that "[w]hen he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic."

154. California requires insurers to offer renewal policies to owners who have suffered losses as a result of a disaster. CAL. INS. § 675.1(a)(3). The state also requires insurers to offer renewal policies in ZIP codes within or adjacent to a fire perimeter for one year after the declaration of a state of emergency. CAL. INS. § 675.1(b)(1).

155. In *United States Trust Company*, the Court acknowledged the states' broad power to regulate private contract, quoting Justice Holmes' dictum that

Finally, consider homeowners who elect not to purchase title insurance. Nearly every purchaser who buys property with bank financing will be prompted to buy a policy. The bank lender will require the purchaser to pay for a lender's policy to protect the bank, and the insurer will then market an owners' policy, at a price lower than the purchaser would pay if the lender had not bought a lender's policy. Nevertheless, some purchasers will balk at yet another expensive closing cost, especially if the lender does not require owner's insurance. Perhaps the best way to deal with this problem would be to require lender's insurance to cover the homeowner for post-policy forgery and fraud. The burden on title insurers would be slight, and the homeowner pays for the lender's insurance in any event.

CONCLUSION

The well-meaning reformers who have offered approaches to title theft have neither expertise nor a financial stake in resolution of the problem. As a result, the proposed reforms have overlooked the mechanism best suited to reducing and spreading the risks of deed theft: title insurance. Because title insurers already monitor local property records, they are in a far better position to monitor and react to the filing of forged and fraudulent instruments than the consumers victimized by forgers and fraudsters. Requiring them to cover losses resulting from deed forgery and fraud would give them the financial incentive to use their expertise to reduce consumer losses. Some wrongdoing will undoubtedly persist. But title insurance coverage would spread that remaining risk among property owners generally—the class susceptible to the risk.

“One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.” See *United States Trust Co.*, 431 U.S. at 22 (quoting *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)). The court went on to note that “as is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.” See *supra* note 151 at 22–23.