

TITLE INSURANCE: PROTECTING PROPERTY AT WHAT PRICE?

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ABSTRACT

The real property recording system is designed to protect purchasers and mortgagees against defects in title. Navigating that system is beyond the capacity of most laymen; historically, purchasers hired lawyers and other professionals to identify and eliminate title risks. Institutional lenders, however, sought more protection than a lawyer's opinion could provide, leading to the development of title insurance.

*Title insurance, unlike most other insurance, is focused not on risk spreading but on risk elimination. By examining title before issuing a policy, a title insurer minimizes the likelihood of a successful claim by an insured whose title turns out to be defective. Evidence establishes, however, that the price of title insurance exceeds the total cost of producing it, even accounting for the insurer's *ex ante* search costs. Concentration in the industry is a contributing factor, but the principal problem is that the industry's customers are largely insensitive to price. Lenders require home purchasers to buy title insurance, but those purchasers are one-shot customers who have little incentive to spend time and money comparison shopping.*

Moreover, in many jurisdictions, purchasers who did engage in comparison shopping would soon learn that the prices charged by "competing" title insurers are nearly identical—due in part to well-meaning but ineffective state regulation of the industry. That regulation often erects barriers to entry that make it difficult for startups to introduce more cost-effective title insurance models based on modern technology. Federal regulation has been no more effective in protecting consumers against excessive title insurance cost.

Regulation would be more effective if it focused less on title insurers and instead required lenders to bear more of the cost of title insurance. As repeat players with significant resources, institutional lenders have leverage with title insurers that home purchasers do not and also have the capacity to influence legislators to remove barriers facing startups seeking to disrupt the industry.

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INTRODUCTION

Title insurance has become ubiquitous in American real estate transactions. Because states and localities do not generally maintain offices with the capacity to certify title to particular parcels of land, lenders and purchasers face the risk that an unforeseen party will advance claims that jeopardize their interests. Title insurance reduces that risk. The insurer agrees to indemnify the lender or purchaser against losses attributable to adverse claims.

Reduction of title risk comes at a cost: the title insurance premium paid to the title insurer. In 2019, lenders and purchasers paid \$15.81 billion in title insurance premiums.¹ By contrast, the industry paid out only \$544 million in claims.²

The dramatic difference between premiums collected and claims paid is not all profit to the title insurer. Unlike most other forms of insurance, which focus on risks eventuating after issuance of the policy, title insurance protects purchasers against risks that are already in place on the date the insurer issues the policy.³ As a result, much of the cost—and value—of title insurance is informational, reflecting the insurer's efforts to ferret out and resolve title risks before title closes and the policy becomes effective.⁴

The disparity between premiums and claims nevertheless raises a basic question: does title insurance add enough value to justify the premiums the title insurers collect? The market does not provide an answer to that question, because the consumers of title insurance are largely price insensitive. In the typical real estate transaction, the mortgage lender, most often a bank, acquires a policy insuring its loan against adverse claims, but

1. Press Release, Am. Land Title Ass'n, American Land Title Association Reports Title Insurance Premium Volume Up 6.5 Percent in 2019 (Apr. 23, 2020), <https://www.alta.org/publications/press-release.cfm?American-Land-Title-Association-Reports-Title-Insurance-Premium-Volume-Up-65-Percent-in-2019> [https://perma.cc/P775-P2R7].

2. *Id.* Although the premiums collected are somewhat cyclical, depending on the strength of the real estate market, title insurance claims have historically amounted to between 4 and 12 percent of premiums collected. Thomas A. Hemphill, *The Title Insurance Industry: Infusing Innovation and Competition*, 54 BUS. ECON. 177, 178 (2019) (citing A.M. Best Special Report 2010).

3. See Quintin Johnstone, *Title Insurance*, 66 YALE L.J. 492, 494–95 (1957) [hereinafter Johnstone, *Title Insurance*] (noting that title insurance excludes defects arising after the date of the policy); Peter Soskin, *Protecting Title in Continental Europe and the United States—Restriction of a Market*, 7 HASTINGS BUS. L.J. 411, 426 (2011) (noting that by the time the policy is purchased any events that would result in a claim have already occurred).

4. Johnstone, *Title Insurance*, *supra* note 3, at 494 (noting that title insurance stresses “risk delineation rather than risk coverage”); Joyce D. Palomar, *Bank Control of Title Insurance Companies: Perils to the Public That Bank Regulators Have Ignored*, 44 SW. L.J. 905, 929 (1990) (noting that title insurance “is structured on the concept of risk elimination, not solely on risk assumption and distribution of loss”).

passes the bill for that insurance to the purchaser as a “closing cost.”⁵ The lender has no incentive to shop for insurance, or even to decide whether insurance is worth the cost, because the lender does not pay for the insurance. And the purchaser has no meaningful choice, because the lender will not make the mortgage loan unless the purchaser pays for the insurance. Moreover, because the premium is a one-shot expense for the purchaser, and represents a modest percentage of the overall purchase price of the real property, the housing consumer is unlikely to engage in much comparison shopping.

If the housing consumer did try to comparison shop, the consumer would face a market with little price competition. Four major players in the title insurance industry have captured 85 percent of the title insurance market.⁶ Congress has largely left regulation of insurance, including title insurance, to the states. Although states have taken different approaches to regulation, state regulation has not ameliorated, and in some circumstances has exacerbated, the absence of competition in the industry. As a result, within any state the rates charged by competing insurers are often close to identical.

A unique problem with regulation of title insurance rates is that the regulators have no reliable basis for assessing the value of the product title insurers sell. Because the principal value of the insurance is in claims avoided rather than claims paid, the ratio of claims to premiums is not nearly as relevant as it might be with other forms of insurance. And regulators have little insight into the claims avoided by the work that precedes issuance of the title policy and no financial incentive to investigate.

Although no entity has perfect information about the problems title insurers avoid, the entities in the best position to monitor title insurance costs and benefits are the primary consumers of title insurance: institutional lenders. These lenders are repeat players who, unlike regulators, have the opportunity to see and evaluate the title reports prepared by the insurers. The problem is that lenders derive the primary benefit of title insurance while they bear none of the costs, removing their financial incentive to police the industry.

The title insurance industry is poised for disruption. A number of startups are attempting to harness modern technology to offer title insurance more

5. See Hemphill, *supra* note 2, at 177 (noting that nearly all lenders require buyers to purchase the lender’s title insurance policy).

6. Press Release, Am. Land Title Ass’n, *supra* note 1. The players are title insurance “families,” each of which is comprised of a number of insurance companies under common ownership. No other title insurer has captured more than 3.5 percent of the market. See Complaint at 1–2, *Fid. Nat’l Fin., Inc.*, F.T.C. Docket No. 9835, F.T.C. File No. 181-0127 (2019), https://www.ftc.gov/system/files/documents/cases/d09385_fidelity_stewart_administrative_complaint_public_version.pdf [<https://perma.cc/9BSU-TMXG>].

quickly and cheaply than the established companies.⁷ So far, they have had limited success because their primary potential customers—institutional lenders—have insufficient incentive to patronize startups as long as consumers foot the bill. Moreover, existing regulations in many states complicate entry into the highly concentrated title insurance market.

A more productive regulatory structure would enlist lenders to monitor title insurance cost. Lenders would be much more likely to root out inefficiencies in the industry if they were required to bear more of the cost of title insurance. A simple fix would be to ban banks from billing purchasers separately for title insurance and to require banks instead to roll title insurance fees into the basic interest rate of mortgage loans.

Consumers shop for mortgage loans based on interest rates; although title insurance is a multi-billion-dollar industry, title insurance costs are an afterthought for an individual consumer choosing a lender. Federal statutes—the Truth in Lending Act (TILA)⁸ and the Real Estate Settlement Procedures Act (RESPA)⁹—mandate that lenders disclose expected costs, including title insurance costs, within three days after receiving a loan application.¹⁰ But only the most careful consumer is likely to focus on the fine print in federal disclosure statements, and even that careful consumer may not find it worth the time and effort to shop around for a one-time saving in premium cost.

Consumers do, however, compare interest rates, which they expect to pay for the life of their mortgage loans. If lenders were required to bundle title insurance with interest rates, they would have a financial incentive to control title insurance costs to gain, or maintain, a competitive advantage. If the goal is to control title insurance costs, then the optimal solution may not be more regulation of title insurers, but instead, more regulation of their principal customers: institutional lenders.

In developing this thesis, Part Two briefly explores the development of title insurance. Part Three describes the complex structure of the industry, setting the stage for the current regulatory landscape. Parts Four and Five explore state and federal regulation, respectively, and explain why neither

7. See *InsurTech & Technology: An Imminent Threat to a Title Agent's Business?*, SLK (Feb. 12, 2019), <https://www.slkglobalsolution.com/blog-insurtech-technology-an-imminent-threat-to-a-title-agents-business/3996/> [<https://perma.cc/B86U-RUJX>] (noting the rise of new entrants, including two, StatesTitle and OneTitle, focused on underwriting title insurance and competing with major industry players).

Alas, OneTitle's efforts to slash title insurance rates were unsuccessful, and the company ceased operations in 2020. E.B. Solomont, *OneTitle Set Out to Change the Title Industry. Now It's Out of Business*, REAL DEAL (Nov. 5, 2020, 1:25 PM), <https://therealdeal.com/2020/11/05/onetitle-set-out-to-change-the-title-industry-now-its-out-of-business/> [<https://perma.cc/UF9A-T8V7>].

8. 15 U.S.C. § 1604.

9. 12 U.S.C. § 2603.

10. 12 C.F.R. § 226.19(a)(1)(i) (2020).

has been effective in ensuring that the price of title insurance correlates effectively with the cost of providing it. Part Six outlines an alternative approach that homes in on lenders rather than insurers as the most promising targets for regulation.

I. DEVELOPMENT OF TITLE INSURANCE: A BRIEF HISTORY

In the common law tradition, property is a relative concept; disputes are settled not by determining who is the absolute owner of property, but instead by deciding which of the competing claimants has better title to the disputed item.¹¹ A number of common law jurisdictions have modified that tradition with respect to land, adopting the Torrens registration system, which does identify the single owner of any registered parcel of land.¹² Although registration is available in some American states,¹³ for the most part, real estate practice in the United States relies on the recording acts to provide purchasers and lenders with relevant—but not dispositive—information about the state of title.

No single recorded document provides a prospective purchaser with complete information about the state of title to a parcel of land. Easements or restrictive covenants recorded decades ago may still burden a parcel of land even if more recent deeds make no mention of those restrictions.¹⁴ Recorded mortgages remain a threat to clear title unless a release or satisfaction has been recorded.¹⁵ A purchaser cannot find these documents in a single file in the local recording office. Instead, in most jurisdictions, title documents are recorded chronologically, and then indexed by grantor and grantee, not by block and lot number.¹⁶ Judgment creditors and heirs of deceased owners may have acquired interests in land that do not appear at

11. The relativity of title concept is on full display in the classic case of *Armory v. Delamirie*, (1722) 93 Eng. Rep. 664, 664 (KB), where the court opined 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.”

12. In 1925, for instance, England enacted the Land Registration Act of 1925, 15 Geo. 5, c. 21. For discussion of the English experience, see C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem*, 63 IND. L.J. 55, 90–105 (1987).

13. For a recent discussion of the American experience with Torrens registration, focused in particular on one state, see John V. Orth, *Torrens Title in North Carolina—Maybe a Hundred Years is Long Enough*, 39 CAMPBELL L. REV. 271 (2017).

14. Marketable title acts enacted in a number of states are designed to relieve purchasers from some restrictions last recorded in the distant past. But those statutes include exceptions and create title problems of their own. See generally Walter E. Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 72–77 (1967) (discussing effect of statutes with respect to easements and other restrictions).

15. See 3 PATTON AND PALOMAR ON LAND TITLES § 567 (3d ed. 2020).

16. See Barnett, *supra* note 14, at 49–50 (discussing complexity of search in a jurisdiction with a grantor-grantee index).

all in the land records; a search of judgment and probate records may be necessary to ferret out those interests.

Before the advent of title insurance, lawyers and abstractors played the primary role in protecting purchasers from defective title.¹⁷ Although lawyers initially were active in searching public records, it subsequently made economic sense to delegate the actual search of public records to abstractors, who were generally not lawyers.¹⁸ Once an abstractor searched the records to identify all transactions affecting the subject parcel, he or she would prepare a written abstract of title describing all of those transactions.¹⁹ A lawyer would then evaluate the abstract and provide the purchaser with an opinion on the state of title.²⁰

If a claimant successfully challenged the purchaser's title, the purchaser had a claim against the abstractor or the lawyer who had opined on the state of title—but only if the purchaser could prove that the abstractor or lawyer had acted negligently.²¹ If the successful adverse claim was not one that a reasonably careful lawyer would have discovered, the purchaser had no recourse. Moreover, because claims against lawyers or abstractors were based on contract or tort duties, they were subject to a statute of limitations which precluded recovery if a purchaser did not discover defects relatively soon after commissioning the title examination.²²

Watson v. Muirhead,²³ the case often identified as the catalyst for development of title insurance,²⁴ made it crystal clear that abstractors and lawyers were liable to purchasers only if they were negligent. Because of a shortage of lawyers, Pennsylvania had developed a cadre of lay conveyancers who were entitled to facilitate land transfers.²⁵ *Watson*, who

17. See John C. Payne, *In Search of Title (Part 1)*, 14 ALA. L. REV. 11, 35–36 (1961) (describing role of lawyers and abstractors).

18. *Id.* at 36 (noting that lawyers delegated the clerical, tedious, and time-consuming task of abstracting to lay abstractors whose specialized knowledge increased the efficiency of preparing abstracts).

19. Unlike earlier conveyancers, who provided their findings to counsel (and their clients), the title abstract prepared by abstractors provided clients with written evidence of the abstractor's findings, and a kind of "proof" of title. DANIEL D. GAGE, JR., *LAND TITLE ASSURING AGENCIES IN THE UNITED STATES* 41–43 (1937).

20. 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, 438 (2000) (discussing role of attorney's title opinion); see generally 1 PATTON AND PALOMAR ON LAND TITLES § 41 (3d ed. 2020).

21. See Malloy & Klapow, *supra* note 20, at 437–38; Palomar, *supra* note 4, at 928.

22. GAGE, *supra* note 19, at 58.

23. *Watson v. Muirhead*, 57 Pa. 161 (1868).

24. See, e.g., J.E. Rhodes, *Insurance of Real Estate Title*, 10 CONN. BAR J. 206, 210 (1936) ("It is generally recognized that the agitation which led to the inception of title insurance in this country was the aftermath of the case of *Watson v. Muirhead*."); GAGE, *supra* note 19, at 80 (concluding that *Watson* was the greatest single force in changing title assurance practices).

25. See generally GAGE, *supra* note 19, at 41 (noting that in many states conveyancers set up offices of their own, and then submitted their findings to counsel).

was seeking to acquire a ground lease, hired Muirhead, a lay conveyancer, to examine the seller's title. During his examination, Muirhead discovered a judgment against one of the seller's predecessors. Muirhead consulted with a lawyer, who advised him that the judgment was not a lien against the property and that the property was otherwise free of encumbrances. Muirhead so advised Watson, who sued Muirhead when it turned out that the outstanding judgment enjoyed priority over the seller's title (and therefore over Watson's title). The Pennsylvania Supreme Court upheld a jury verdict for Muirhead, indicating that a conveyancer could not be held liable in the absence of "evidence of want of ordinary knowledge and skill and of due caution."²⁶

Whether *Watson* precipitated the birth of the title insurance industry remains a matter of contention,²⁷ but in any event, the first title insurance company was established in Pennsylvania eight years after the decision.²⁸ By World War I, the use of title insurance had spread to a number of major cities, where title records had become more complex and the title search process had become less attractive for lawyers who could do better financially in more remunerative practices.²⁹ In other areas, abstractors and lawyers remained the primary vehicles for title protection.³⁰

After World War I, institutional investors spurred the spread of title insurance.³¹ As life insurance companies, in particular, began to invest in real estate mortgages, they saw title insurance as a more reliable mechanism

26. *Id.* at 168.

27. Compare GAGE, *supra* note 19, and Rhodes, *supra* note 24, with E.F. Roberts, *Title Insurance: State Regulation and the Public Perspective*, 39 IND. L.J. 1, 6–7 (1963) (noting that a land boom in Philadelphia resulting from an 1876 exposition was stretching the capacity of conveyancers to search title without cutting corners and thus subjecting the conveyancers to risks).

28. See Rhodes, *supra* note 24, at 213.

29. See Johnstone, *Title Insurance*, *supra* note 3, at 515 (noting that large city lawyers could follow more remunerative pursuits); Roberts, *supra* note 27, at 7 (noting that conveyancing had become a profitless chore for lawyers in urban areas).

30. Johnstone, *Title Insurance*, *supra* note 3, at 515; see also Marvin N. Bagwell, *May an Attorney Refer the Attorney's Real Estate Clients to a Title Agency Owned by the Attorney? The Battle for New York*, 45 N.Y. REAL PROP. L.J. 13 (2017–18) (noting that in upstate New York title abstracts and attorney opinions continue to exist as substitutes for title insurance). An early account explained why title insurance was confined to larger cities and immediate suburbs:

In localities where real estate title work is static in its nature and there is no great accumulation of real estate records . . . there is little demand for the title policy, but as the records become more and more voluminous, their use and interpretation becomes more and more difficult . . . [and] . . . the necessity for the insurance protection which is afforded by the title policy becomes more and more apparent.

Rhodes, *supra* note 24, at 214.

31. Growth was apparently slow during the first decade of the twentieth century. GAGE, *supra* note 19, at 80.

to protect their investment.³² Unfortunately, investors sought protection not merely against title defects, but against borrower default. Title insurers began to issue mortgage insurance as well as title insurance—a decision that proved disastrous with the onset of the Great Depression, when precipitous declines in property value led to widespread default, and to the failure of many title insurance companies.³³

At the same time, the Great Depression marked the dawn of a new era in the American housing market, and in the use of title insurance. Before the advent of the Federal Housing Administration (FHA), banks typically issued interest-only mortgage loans for short periods, and only for less than half the purchase price of most homes.³⁴ With the advent of federal mortgage guarantees, banks changed those practices, making fifteen or thirty year mortgages available for the first time, and permitting borrowers to finance the bulk of the purchase price.³⁵ These policies made home ownership available to a much wider swath of Americans. As banks issued mortgage loans on a wider scale, they became less willing to rely on local lawyers for title assurance, and instead turned to title insurance companies to protect their security—especially because they could pass on the cost of insurance to the housing purchaser. With the post-World War II housing boom, title insurance became the norm in most populous areas.³⁶

Although title insurance had become well-entrenched before the mortgage securitization movement that culminated in the 2008 collapse of the housing market, securitization further cemented title insurance as the primary mechanism for assuring title. Underwriters and investors in an array of mortgages were not in a position to examine title reports on individual properties. Instead, they needed a homogenized product that individual lawyer opinions could not provide.³⁷

32. See Johnstone, *Title Insurance*, *supra* note 3, at 502–03 (noting that life insurance companies, as nationwide lenders, preferred title insurance as the most standardized form of title protection); Roberts, *supra* note 27, at 8 (noting that life insurance companies, who were eager to invest in real estate mortgages, began to demand title insurance as a condition precedent to mortgage loans, especially since the insurance cost the lender nothing). See also GAGE, *supra* note 19, at 59 (noting insurer dissatisfaction with the abstractor/lawyer method of title insurance because of delays, cost, and the bulk of the abstracts).

33. See Roberts, *supra* note 27, at 10; Payne, *supra* note 17, at 37 (noting failure of New York companies during the Depression).

34. See Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, 19 J. ECON. PERSPS. 93, 94–95 (2005).

35. *Id.* at 95–96 (noting that the initial change was from interest-only mortgages to twenty-year self-amortizing mortgages).

36. See Roberts, *supra* note 27, at 14 (describing effect of post-war boom on title insurance); see generally JOYCE D. PALOMAR, 1 TITLE INS. L. § 1.3 (2020 ed.).

37. See Malloy & Klapow, *supra* note 20, at 442 (noting that participants in the secondary mortgage market require that residential mortgages be backed by title insurance).

II. THE STRUCTURE OF THE INDUSTRY

A. *The Underwriters*

Four major underwriters dominate the title insurance industry. The “Big Four” families (Fidelity National, First American, Old Republic, and Stewart) control 85 percent of the national market.³⁸ Each of the “Big Four” operates a number of subsidiaries that were formerly independent underwriters. For instance, through a series of mergers and acquisitions, Chicago Title, Commonwealth Title, Lawyers Title, and Ticor Title have all become part of the Fidelity “family.”³⁹ A variety of independent underwriters control the remaining 15 percent of the market.⁴⁰ Growing concentration in the industry has received considerable FTC scrutiny; the potential for FTC intervention recently scuttled a proposed merger between two of the Big Four.⁴¹

National title insurance underwriters sometimes sell insurance policies through branch offices staffed by employees.⁴² More often, however, they issue policies through local agents.⁴³ Many local agents are independent and may work with more than one national insurer.⁴⁴ Others are owned by or

38. See Hemphill, *supra* note 2 (figures for 2017); see also Press Release, Am. Land Title Ass’n, *supra* note 1.

39. Fidelity acquired Chicago title in a 1999 merger. See Anne Marie Squeo, *Fidelity National Agrees to Buy Chicago Title in \$1.2 Billion Deal*, WALL ST. J., Aug. 2, 1999, at A4, <https://www.wsj.com/articles/SB933557899693789095>. Chicago Title had acquired Ticor Title several years earlier. See *Our History*, TICOR TITLE, <https://ticorhospitality.com/company/about-us/> [<https://perma.cc/W6XV-JL7P>]. In 2008, Fidelity acquired the distressed LandAmerica Financial Group, which had previously acquired Commonwealth and Lawyers Title. See Press Release, Fidelity Nat’l Fin., Inc., Fidelity National Financial, Inc. and LandAmerica Financial Group, Inc. Announce the Signing of a Definite Merger Agreement (Nov. 7, 2008, 12:00 AM), <https://www.investor.fnf.com/news-releases/news-release-details/fidelity-national-financial-inc-and-landamerica-financial-group> [<https://perma.cc/2NHC-NQKD>].

40. Press Release, Am. Land Title Ass’n, *supra* note 1.

41. See Eddie Small, *Title Insurance’s Big Three Are Not to Be: Fidelity, Stewart Call Off \$1.2B Merger*, REAL DEAL (Sept. 10, 2019, 3:11 PM), <https://therealdeal.com/national/2019/09/10/title-insurances-big-three-are-not-to-be-fidelity-stewart-call-off-1-2b-merger/> [<https://perma.cc/X9YP-5NDW>]. The FTC has also required divestitures as a condition of approval of previous mergers within the industry. See, e.g., Hemphill, *supra* note 2, at 180 (noting prior divestiture requirements imposed as a condition for approval of acquisitions); Press Release, Fed. Trade Comm’n, FTC Preserves Competition in Market for Title Information Services (Jan. 12, 2000), <https://www.ftc.gov/news-events/press-releases/2000/01/ftc-preserves-competition-market-title-information-services> [<https://perma.cc/NFV7-HAB8>].

42. J. Bushnell Nielsen, *Real Estate Closing, Title Examination and Title Insurance Policy Procedures and Customs in the United States by Region*, Fall 2018 REAL EST. FIN. J. 19, 27.

43. See BARLOW BURKE, LAW OF TITLE INSURANCE § 1.02 (3d ed. 2019); PALOMAR, *supra* note 36, § 2.2. In California, companies that prepare title examinations and abstracts on the basis for which title insurers write title policies are called “underwritten title companies.” CAL. INS. CODE § 12340.5 (West 2020).

44. PALOMAR, *supra* note 36, § 2.2; see also BURKE, *supra* note 43, § 2.02.

affiliated with a single national underwriter.⁴⁵ National underwriters sometimes buy local agencies outright. In other circumstances, they buy a share in those agencies, at inflated prices,⁴⁶ to ensure a steady stream of business from the former proprietors who continue to run the agencies. Local and regional underwriters, too, sell policies through a combination of their own employees and independent agents.⁴⁷

B. The Agents

In most cases, agents play a critical role in the title insurance process. Agents, not the national underwriters, receive insurance applications.⁴⁸ They are primarily responsible for conducting title searches and title examinations.⁴⁹ In some states, underwriters provide agents with standard forms, and authorize agents to write policies, and to bind the underwriters, based on the results of that search and examination.⁵⁰

In other states, rules governing the unauthorized practice of law require that lawyers perform some or all of the search and examination function.⁵¹ In some of these states, agents contract with lawyers to examine title, and then write policies based on that examination. In other states, underwriters designate particular lawyers as “approved attorneys” and authorize the agent to issue policies based on the opinion of one of the approved attorneys.⁵²

Lawyers frequently own title agencies, especially in those states that require lawyer involvement in the search and examination process.⁵³ Real

45. Charles Nyce & M. Martin Boyer, *An Analysis of the Title Insurance Industry* (May 16, 2014) (unpublished manuscript), <http://chairegestiondesrisques.hec.ca/wp-content/uploads/pdf/cahiers-recherche/98-14.pdf> [<https://perma.cc/6AB4-Q6S3>].

46. See, e.g., *Edwards v. First Am. Corp.*, No. CV 07-03796 (FFMx), 2016 WL 8943464 (C.D. Cal. June 20, 2016) (approving class actions settlement arising out of First American’s purchase of a minority share of title agents at inflated prices in return for a commitment to purchase insurance from First American).

47. Nielsen asserts that most regional insurers write insurance exclusively through agents. Nielsen, *supra* note 42, at 27–28. Burke contends that more local insurers are more likely to use their own employees. BURKE, *supra* note 43, § 2.02. He remarks, however, that the traditional distinction between local and national insurers “has, however, blurred as mergers and acquisitions have swept the industry.” *Id.*

48. See PALOMAR, *supra* note 36, § 2.2 (noting that the local agents receive the applications for insurance).

49. See John C. Christie, Jr., *The Title Insurance Industry: A Reexamination Revisited*, 18 REAL EST. L.J. 354, 360–61 (1990) (noting that “title search and examination are necessary prerequisites to the establishment of a title insurance relationship”); Soskin, *supra* note 3, at 429.

50. See BURKE, *supra* note 43, § 2.02; see generally Nielsen, *supra* note 42, at 30–32.

51. See, e.g., N.C. GEN. STAT. § 58-26-1 (2020) (title insurance may not be issued until the title company has obtained the opinion of a licensed attorney who is not an employee or agent of the company); see generally Nielsen, *supra* note 42, at 31.

52. For an example of a contract between a title insurer and an approved attorney, see *Old Republic Nat’l Title Ins. Co v. Attorney Title Servs., Inc.*, 682 S.E.2d 134, 136 (Ga. Ct. App. 2009).

53. Nielsen, *supra* note 42, at 31.

estate brokers, or their principals, also own all or part of title agencies in a number of states.⁵⁴

In addition to their involvement in the title assurance process, title agencies often provide ancillary services: they may serve as loan “closers” or as escrow agents.⁵⁵ Perhaps most important from the underwriter’s standpoint, agents generate business by providing reliable service and by establishing relationships with lenders, brokers, and other referral sources.⁵⁶

C. Title Plants

In reality, however, few title searches require the title agency to pore through volumes of public records. Many agencies have developed title plants: private compilations of title records that are better organized than public records. These title plants vastly simplify the title examination process.⁵⁷ Some states require title insurers to maintain title plants.⁵⁸ Title plants are of two basic types. The first, increasingly common, and most comprehensive type of plant essentially duplicates all of the relevant public records (including not only transfers, but judgments and other public documents that might affect title), centralizes them in a single location, and presents them in a form more accessible than might be available through the publicly administered system.⁵⁹ A comprehensive title plant also improves on the public records by including records of prior title searches—sometimes called the “back title”—which further simplifies new title searches by reducing the need to search for documents recorded before the

54. See, e.g., *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 724 (6th Cir. 2013) (detailing interlocking ownership of title agency by real estate broker and title underwriter).

55. See PALOMAR, *supra* note 36, § 2.2 (noting that local agents provide escrow and trust services, assist applicants with filing documents to cure title problems, and close real property transactions). Whether title agents provide these services varies considerably from state to state, and depends in large measure on what the state considers to be unauthorized practice of law. In states where neither title nor closing responsibilities are considered the practice of law, title agents are most likely to provide these ancillary services. Nielsen, *supra* note 42, at 30.

56. See Soskin, *supra* note 3, at 429.

57. See Quintin Johnstone, *Land Transfers: Process and Processors*, 22 VAL. U. L. REV. 493, 507–08 (1988) [hereinafter Johnstone, *Land Transfers*]; Soskin, *supra* note 3, at 427–28 (noting that title plants decrease the length of time required to perform a title search to days or minutes); Palomar, *supra* note 4, at 930 (noting that where insurers own title plants, they use public records only for daily take-offs and occasional inquiries; the search is conducted through the insurer’s title plant).

58. See, e.g., OR. REV. STAT. § 731.438(1) (2020); N.M. STAT. ANN. § 59A-12-13 (2020).

59. Title plants “constitute a separate method of assembling recorded information based on the location of the property and which offer search capabilities far beyond the grantor/grantee index available at the county recorder.” *In re Ormsby*, 591 F.3d 1199, 1203 (9th Cir. 2010); see generally PALOMAR, *supra* note 36, § 2.2.

Sometimes, title plants include all of the relevant public records; other plants include only indexes to the public records. See generally BURKE, *supra* note 43, § 12.01.

prior search was completed.⁶⁰ Maintenance of the title plant requires regular updating. Title agents update by regularly checking on, and copying, newly recorded documents—a process known as obtaining “take-offs.”⁶¹

A second, more limited, title plant does not reproduce the public records, but instead consists of abstracts produced for all previously insured properties—the back title—so that, with respect to those previously insured properties, any subsequent search need only focus on more recent transactions.⁶² These more limited plants would not meet statutory requirements in most title plant states.

Development of a comprehensive title plant for a given area requires a significant capital investment;⁶³ title plants are a form of natural monopoly because development of multiple title plants would constitute an inefficient duplication of effort.⁶⁴ As a result, in many areas, title plants are jointly-owned.⁶⁵ In other areas, the owner of a plant rents the plant to competitors.⁶⁶ Although many title plants are owned by local agencies, some are owned by national underwriters.⁶⁷ Because title plants are valuable assets that can serve to restrict entry into already concentrated markets, the FTC has sometimes required divestiture of title plants as a condition for approving mergers between title insurers.⁶⁸

The capital investment in developing a title plant significantly reduces the agent’s marginal cost in conducting future title investigation. If insurance premiums did not compensate agents and insurers for the cost of building and maintaining title plants, insurers would have inadequate

60. See generally Charles Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663, 690–91 (2003).

61. See Johnstone, *Land Transfers*, *supra* note 57, at 507–08; Palomar, *supra* note 4, at 930 (discussing daily take-offs). If the title plant becomes outdated, it increases the possibility of errors and losses for the title insurer. See *Industry Fundamentals*, A.M. BEST, <http://www.ambest.com/title/fundamentals.html> [<https://perma.cc/P6DF-VFTX>].

62. See Roberts, *supra* note 27, at 17.

63. See Palomar, *supra* note 4, at 929–30 (noting large sums agencies have invested in building private title plants).

64. See Dale A. Whitman, *Optimizing Land Title Assurance Systems*, 42 GEO. WASH. L. REV. 40, 59 (1973); Nyce & Boyer, *supra* note 45, at 19 (noting inefficiency of multiple title plants); Martin Boyer & Charles M. Nyce, *Market Growth and Barriers to Entry: Evidence from the Title Insurance Industry*, 78 INS. & RISK MGMT. 283, 288 (2010–11) (evidence establishes that title plants are a barrier to entry in the title insurance industry).

65. For litigation over one such jointly-owned title plant, see *Stewart Title Co. of Memphis v. First Am. Title Ins. Co.*, 44 F. Supp. 2d 942 (W.D. Tenn. 1999).

66. See BURKE, *supra* note 43, § 12.01 (discussing co-operative title plant arrangements).

67. See PALOMAR, *supra* note 36, § 2.2 (observing that title plants originated with local agencies, even if today national insurers maintain their own title plants in many areas).

68. See, e.g., Press Release, Fed. Trade Comm’n, Fidelity National Financial Settles FTC Charges that its Acquisition of LandAmerica Subsidiaries Reduced Competition in Title Information Markets (July 16, 2010), <https://www.ftc.gov/news-events/press-releases/2010/07/fidelity-national-financial-settles-ftc-charges-its-acquisition> [<https://perma.cc/KM8J-S52A>] (detailing requirement that insurer divest title plants as condition of merger approval).

incentive to maintain them. Some of the insurance premium, then, should reflect that cost. Market competition, however, will not operate to ensure efficient pricing because industry structure promotes a form of reverse competition.⁶⁹ Although it is housing consumers who ultimately pay for title insurance, they typically are not the parties deciding whether title insurance will be purchased, or from what firms. Lenders mandate the purchase of insurance. Lenders, brokers, developers, or some combination of them may make recommendations about where those consumers should purchase title insurance, recommendations the consumers are unlikely to scrutinize.⁷⁰ As a result, insurers and their agents have incentives to serve the interests of those lenders, brokers, and developers rather than consumers—a problem that has generated the industry regulation that serves as the focus for the next Part.

D. Premiums and Premium Splits

Unlike property and casualty insurance, which covers risks that materialize during the policy period, title insurance covers only problems already in existence at the time the policy is issued.⁷¹ As a result, title insurers are compensated through a one-time premium that covers the insured's interest for as long as the insured owns that interest.⁷² When a purchaser finances a home with a mortgage, the lender will generally insist on a policy insuring the lender's title.⁷³ If the purchaser wants to protect her interest, she will have to buy a separate owner's policy, which will typically be discounted.⁷⁴ If the purchaser refinances the loan, the insurer will collect an additional premium to cover the refinanced loan.⁷⁵

Premiums are split between underwriters and agents. The split reflects the respective roles the parties play in the title insurance process. Typically, agents retain between 60 and 90 percent of title insurance premiums; the

69. See, e.g., Noel D. Uri, *The Title Insurance Industry: A Reexamination*, 17 REAL EST. L.J. 313, 329 (1989).

70. See Soskin, *supra* note 3, at 440–41.

71. See David Keleher, *Title Insurance: Overview and Key Regulatory Concerns*, CIPR NEWSLETTER, July 2012, at 19, 19–20. Title Insurance is a form of “claims made” insurance, insuring claims made during the policy period, as distinct from occurrence-based insurance, which insures against events that occur during the policy period. See generally Carolyn M. Frame, “Claims-Made” Liability Insurance: Closing the Gaps with Retroactive Coverage, 60 TEMP. L.Q. 165, 169–72 (1987).

72. See PALOMAR, *supra* note 36, § 1.17.

73. *Id.* § 1.3 (noting that a majority of lenders require loan applicants to obtain lender's title insurance).

74. See *infra* Sections II.E, III.C.2 (discussing discounts).

75. See *infra* Section III.C.2 (discussing refinancing).

underwriter retains the remaining balance.⁷⁶ The split between underwriter and agent is generally a matter of contract; in Florida, however, statute mandates that underwriters receive at least 30 percent of the premium.⁷⁷ The small share generally retained by the underwriter reflects, in part, the dynamics of the title insurance process; title insurance is focused on risk elimination. Proper search and examination should result in claims that are few and far between.⁷⁸ The local agents do the work necessary to avoid those claims, and by virtue of that work, receive the lion's share of the premiums.⁷⁹

E. Price, Cost, and Value

Risk elimination may be at the core of title insurance, but the critical question is whether premiums are higher than necessary to achieve the optimal level of risk elimination. Title insurance rates vary by state, and direct comparison of rates across state lines is difficult for multiple reasons. First, as the next Part demonstrates in greater detail, regulatory structure affects the rates insurers charge. Second, what is included in the price of title insurance varies substantially from state to state. In some states, the package sold as title insurance covers only the risk of adverse claims; in others it may also include the cost of title examination and search, while in still others the price may also cover escrow and closing services.⁸⁰ Published rates may not account for discounts that might be available for some transactions. In addition, the variation of property values among the states makes apples-to-apples comparisons misleading. The price that insurers charge for title insurance increases with the amount insured, while the cost of title search and title examination may not. As a result, insurers may have cost justifications for charging rates that are higher as a percentage of the amount insured in states where property values are low.

Nevertheless, there is strong evidence that market competition does not drive title insurance prices to levels justified by the cost of eliminating and insuring against risk. The first compelling piece of evidence for above-cost

76. See Soskin, *supra* note 3, at 439–40 (estimating that agents receive between 85 and 90 percent of premiums paid); *Industry Fundamentals*, *supra* note 61 (estimating that agents retain 60 to 90 percent); Hemphill, *supra* note 2, (60–90 percent); Uri, *supra* note 69, at 330 (indicating agent retention from 75 to 90 percent).

77. FLA. STAT. § 627.782(1) (2020).

78. The standard lore is that title insurance “is structured on the concept of risk elimination, not solely on risk assumption and distribution of loss.” Palomar, *supra* note 4, at 929.

79. One estimate is that as much as 90 percent of title insurance premiums pay for the cost of preliminary title examination. *Id.*

80. See DAVID J. EATON, LYNDON B. JOHNSON SCH. OF PUB. AFFS., TITLE INSURANCE REGULATION IN TEXAS: CHALLENGES AND OPPORTUNITIES, POLICY RESEARCH PROJECT REPORT NUMBER 171 6 (2011) [hereinafter EATON, TITLE REGULATION IN TEXAS]; BURKE, *supra* note 43, § 1.01(C).

pricing is the correlation between title insurance premiums and the policy limit, which is typically the purchase price of the property. Recall that title insurers pay out in claims only about five percent of the amount they collect in premiums.⁸¹ (Even that five percent overstates the benefits insureds collect on their policies; much of that amount reflects “adjustment expenses” including the cost of defending both against both meritorious and meritless claims.) Insurers justify the remainder of the premiums as necessary to cover the cost of search and examination necessary to avoid future claims. With respect to the five percent of premiums needed to pay claims, a proportional relationship between property price and premiums makes economic sense: a successful challenge to title on an expensive property will cost an insurer proportionately more than a successful challenge to title on an inexpensive property. No comparable justification exists for tying premiums to purchase price with respect to the other 95 percent of the insurance premium; within any county, it costs no more to search and examine title on a \$5,000,000 property than on a \$500,000 property.

Consider the implications of this insight. If the premium for a policy on a \$500,000 home were priced at \$1,000, 95 percent of which reflects the cost of claim avoidance, only \$50 of the \$1,000 premium is attributable to the expected cost of successful claims. With a home price of \$1,000,000, the \$50 should also double because the insurer’s expected payment for claims would double to \$100. If premiums reflected cost to the insurer, the total premium should increase by five percent, to \$1,050. If the housing price were \$5,000,000—ten times the original \$500,000—the total premium should increase by 45 percent, to \$1450, \$500 representing the risk of successful claims, and \$950 to reflect the cost of claim avoidance. In a competitive market, competition would drive premiums to those levels.

Now consider the actual rate structure used by title insurers. Focus on Illinois, the largest state in which title insurance rates are not subject to state regulation. A \$500,000 policy from First American costs \$2,420, a \$1,000,000 policy costs \$3,550, a 47 percent increase, and a \$5,000,000 policy costs \$9,550, a 295 percent increase.⁸² Cost factors cannot justify the correlation between these premiums and property price.

Title insurers sometimes explain this pricing structure as a redistribution scheme in which purchasers of expensive properties subsidize purchasers of

81. See *supra* text accompanying note 2.

82. Premiums drawn from First American Title’s fee calculator for property in DuPage County, Illinois. Fee Calculator, FIRST AM. TITLE, <https://facc.firstam.com/Summary?SSID=0.7698563355277644> [https://perma.cc/XH4P-M9GD].

lower priced properties.⁸³ That explanation rests on the dubious premise that title insurers willingly sell title policies on lower priced properties at a loss, even when no government mandate requires them to do so. A more plausible explanation is that so long as title insurance rates represent a sufficiently small percentage of purchase price, consumers will not think the charges unreasonable, especially because they do not understand the low probability of a successful claim. A purchaser of a \$5,000,000 home who knows that the real estate broker has received a \$300,000 commission on the sale may not think twice about paying \$10,000 for title insurance as one of the costs of closing.

A second piece of evidence that title insurers engage in above-cost pricing is the extra charge insurers impose when a loan policy and an owner's policy are purchased simultaneously. Although the owner's policy and the loan policy protect the interests of different parties, the loan policy involves no additional cost from the insurer's perspective and imposes no additional risk beyond the costs and risks the insurer covers in the owner's policy. The insurer conducts one title search and examination, not two separate ones. And the insurer's maximum liability is the same whether the owner has purchased in cash or subject to a mortgage. There is, therefore, no cost-based justification for collecting more in total premiums for a transaction in which the owner finances with a mortgage than one in which an owner purchases with cash.

Although title insurers typically offer the second policy at a "discount," the discount is often modest. To use Illinois as an example again, the purchaser who buys both a loan policy and an owner's policy on a \$500,000 home with a \$400,000 mortgage would pay \$3,330 in title insurance fees rather than the \$2,420 cost for an owner's policy alone—an increase of \$910, or 38 percent.⁸⁴

F. Kickbacks

The prevalence of kickbacks in the industry reinforces the conclusion that title insurance prices exceed the cost of providing title insurance services. When price equals marginal cost, kickbacks do not arise because,

83. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-401, REPORT TO THE RANKING MEMBER, COMM. ON FIN. SERVS., H.R., TITLE INSURANCE: ACTIONS NEEDED TO IMPROVE OVERSIGHT OF THE TITLE INDUSTRY AND BETTER PROTECT CONSUMERS 32–34 (2007), <https://www.gao.gov/assets/260/259269.pdf> [<https://perma.cc/FG38-MCF9>] (noting that industry officials attribute higher premiums on higher-priced homes to cross-subsidization).

84. Premiums drawn from First American Title's fee calculator for property in DuPage County, Illinois. *Fee Calculator*, *supra* note 82.

“there is no excess of price over cost that might be paid as a kickback.”⁸⁵ Explicit federal and state prohibitions on kickbacks—discussed in the next two Parts—respond to the kickbacks that had been common in the industry.⁸⁶ Although the statutory prohibitions have undoubtedly curbed the use of kickbacks, insurance agents have sought ways to avoid those prohibitions by making disguised payments to referral sources: real estate agents, developers, and mortgage brokers.

In *Obiefuna v. Hypotec, Inc.*,⁸⁷ a federal district court, in denying a lender’s motion to dismiss a RICO claim, outlined the basic allegations that have formed the basis of several class actions involving a kickback scheme engineered by a single title agency—All Star Title.⁸⁸ The title agency designed and executed a scheme under which kickbacks for the benefit of lenders would be laundered through a variety of channels. Typically, the title agency would pay a third-party marketing company for marketing services aimed at attracting companies to the participating lender.⁸⁹ Sometimes, the marketing company would issue sham invoices to the title agency, making it appear as if the services were for the title agency’s benefit.⁹⁰ On other occasions, the marketing company would issue split invoices, with the title agency paying a portion of the services rendered and the lender paying the rest.⁹¹ On still other occasions, the title agency made payments to the third-party marketer without any invoices at all.⁹² The payments made by the title agency were tied to the number of referrals the lender made to the agency.⁹³

The kickbacks attributed to All Star were feasible only if All Star was receiving more for its title services than the cost of providing those services. Moreover, All Star’s behavior was not aberrational. Other title agencies

85. Mark V. Pauly, *The Ethics and Economics of Kickbacks and Fee Splitting*, 10 BELL J. ECON. 344, 346 (1979).

86. See *Consumer Fin. Prot. Bureau v. Borders & Borders, PLC*, No. 13–CV–1047, 2015 WL 631196, at *1 (W.D. Ky. Feb. 12, 2015) (discussing prevalence of kickbacks and unearned fees that drove up the cost of real estate settlements and precipitated enactment of RESPA in 1974).

87. *Obiefuna v. Hypotec, Inc.*, 451 F. Supp. 3d 928 (S.D. Ind. 2020).

88. Among the other putative class actions involving All Star Title are *Donaldson v. Primary Residential Mortgage, Inc.*, No. 19-1175, 2020 WL 3184089 (D. Md. June 12, 2020); *Walls v. Sierra Pacific Mortgage Co.*, No. 19-595, 2020 WL 1528626 (D. Md. Mar. 31, 2020); and *Somerville v. West Town Bank & Trust*, No. 19-0490, 2019 WL 6131288 (D. Md. Nov. 19, 2019). Each of these actions, including *Obiefuna* itself, was directed at a lender who received the alleged kickbacks.

89. *Obiefuna*, 451 F. Supp. 3d at 934.

90. *Id.*

91. *Id.*

92. *Id.*

93. The complaint alleged that the lender received \$700 for every loan it referred, and that over one two-year period, the lender received a total of \$750,000 in kickbacks. *Id.* at 935.

have faced litigation over similar schemes.⁹⁴ In some cases, developers have been the apparent beneficiaries of kickbacks when they have insisted that customers use a particular title agency, presumably in return for benefits received from that agency.⁹⁵ In others, title companies have allegedly paid referral fees to lawyers, and disguised those fees as payment for legal work that the company has actually done in-house.⁹⁶

Kickbacks might be even more prevalent were it not for the moves brokers and lawyers have made towards vertical integration—a time honored strategy for avoiding (or evading) kickback prohibitions.⁹⁷ In the title insurance industry, lawyers or real estate brokers who acquire title agencies eliminate the need for kickbacks;⁹⁸ because the referral source owns all or part of the service provider, the referral source receives the economic equivalent of a kickback in the form of dividends or other return on investment.

Moreover, the cases that reach litigation undoubtedly represent the tip of the kickback iceberg. No individual buyer has sufficient stake in her title insurance premium to investigate and challenge kickback arrangements. That leaves the field to class action lawyers who face doctrinal obstacles—explored in Part IV—that reduce the attractiveness of title insurance litigation. Indeed, a number of the cases cited in this section have resulted in judgments for defendants without a determination that there was no kickback scheme.⁹⁹ The basic point is that kickbacks remain a problem and provide evidence that market competition is not driving title insurance premiums to the cost of producing title protection.

94. See, e.g., *Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535 (4th Cir. 2019); *Dobbins v. Bank of Am.*, N.A., No. 17-0540, 2020 WL 5095855 (D. Md. Aug. 28, 2020); *Conover v. Patriot Land Transfer, LLC*, No. 17-4625(JS), 2019 WL 397978 (D.N.J. Jan. 31, 2019).

95. See, e.g., *Adams v. Southland Trace, LLC*, No. 07-941-DLD, 2012 WL 12986191 (M.D. La. Feb. 29, 2012) (claim that developer and developer's broker required use of particular title insurer).

96. See, e.g., *Howland v. First Am. Title Ins. Co.*, 672 F.3d 525 (7th Cir. 2012); *Chultem v. Ticor Title Ins. Co.*, 927 N.E.2d 289 (Ill. App. Ct. 2010).

97. Pauly, *supra* note 85, at 349 (noting that any enforced ban on fee splitting can be circumvented by vertical integration).

98. See, e.g., *White v. JRHBW Realty, Inc.*, No. 14-cv-01436, 2015 WL 5470245 (N.D. Ala. Sept. 16, 2015) (real estate broker and title agency owned by same parent company); *Consumer Fin. Prot. Bureau v. Borders & Borders, PLC*, No. 13-CV-01047, 2018 WL 1440606 (W.D. Ky. Mar. 22, 2018) (law firm establishes joint ventures under terms of which it acquires 50 percent interest in nine separate title agencies).

99. For instance, in *Howland*, 672 F.3d 525, the Seventh Circuit denied class certification to the claim that title insurer had split fees with referring lawyers who performed no services, noting that plaintiffs could not establish on a class-wide basis that the lawyers performed no services. And in *Adams*, 2012 WL 12986191, the district court invoked RESPA's one-year statute of limitations to dismiss a number of claims.

G. Startups

Within the last decade, a number of startups have entered the title industry. One Title was founded in 2014;¹⁰⁰ Spruce and States Title followed in 2016.¹⁰¹ Their mission has been to use technology to streamline the entire title process, with resulting cost savings. After a promising start, One Title folded in 2020. Spruce and States Title have each raised significant capital, and Spruce has partnered with Munich Re to have one of its affiliates provide underwriting services.¹⁰² States Title has recently changed its name to Doma and announced its plan to become publicly traded.¹⁰³ States Title's website makes its business model clear: abandon the traditional title search in favor of an algorithmic model.¹⁰⁴ The model's premise is that the reduction in cost from eschewing a search will dwarf any losses from increased claims.

So far, these startups have made barely a dent in the title insurance market. As the next Part demonstrates, many states currently have regulatory requirements that would prevent them from operating. In the right regulatory environment, however, startups could exert significant downward pressure on title insurance premiums.

III. STATE REGULATION OF THE TITLE INSURANCE INDUSTRY

Regulation is the instinctive response to the market imperfections discussed in the preceding Part. Both the federal government and the states have acted to redress imperfections in the market for title insurance. Part IV describes federal involvement—primarily in the form of antitrust review of the industry and RESPA's regulation of the real estate settlement process.

100. See Solomont, *supra* note 7.

101. See *Title Insurance Startup Spruce Raises \$29M in Series B*, REAL DEAL (May 26, 2020, 9:30 AM), <https://therealdeal.com/2020/05/26/title-insurance-startup-spruce-raises-29m-in-series-b/> [<https://perma.cc/U26R-WZLC>]; Jim Dalrymple II, *Digital Closing Startup States Title Raises \$123M Latest Funding Round*, INMAN (May 21, 2020), <https://www.inman.com/2020/05/21/digital-closing-startup-states-title-raises-123m-latest-funding-round/> [<https://perma.cc/EP8M-WPQN>].

102. See *Spruce Partners with Munich Re's Digital Partners to Offer Title Insurance Fueled by Automation; Featuring New Consumer Pricing*, CISION (Sept. 29, 2020, 9:34 AM), <https://www.prnewswire.com/news-releases/spruce-partners-with-munich-res-digital-partners-to-offer-title-insurance-fueled-by-automation-featuring-new-consumer-pricing-301139921.html> [<https://perma.cc/BLQ2-59VK>].

103. See Press Release, States Title, Doma, a Leading Force for Disruptive Change in the Residential Real Estate Industry, Announces Plans to Become Publicly-Traded via Merger with Capitol Investment Corp. V (Mar. 2, 2021), <https://www.statetitle.com/resource/doma-announces-plans-to-become-publicly-traded-via-merger-with-capitol-investment-corp-v/> [<https://perma.cc/J8QE-7YFM>].

104. The website advertises “Frictionless title – in minutes not days” and boasts that it is “[r]eplacing the time and labor-intensive title search process with a predictive analytics algorithm that utilizing a forward-thinking risk based insurance model to clear title commitments instantaneously.” *Truly Instant Underwriting*, DOMA, <https://www.statetitle.com/instant-underwriting/> [<https://perma.cc/RZH7-BJL7>].

For the most part, however, Congress has left regulation of the title insurance industry, like regulation of insurance more generally, to the states.

State regulation varies substantially, but generally targets three objectives: minimizing the number of title insurance claims, ensuring that title insurers will have adequate funding to pay claims, and keeping title insurance costs down. Even if well-intentioned, much of the regulation appears to entrench the interests of existing title insurers rather than keeping title costs down. This Part explores the state objectives, the mechanisms states have chosen to achieve them, and their ineffectiveness in controlling title insurance costs.

A. Minimizing Title Insurance Claims

Title insurance does not guarantee that the insured will enjoy good title to the insured property.¹⁰⁵ Instead, title insurance merely provides protection against financial loss that might result if an adverse claim succeeds,¹⁰⁶ and against legal costs that arise even if the adverse claim fails.¹⁰⁷ From the standpoint of institutional lenders, that protection is adequate. So long as the loan is repaid, the lender is generally indifferent about the source of the funds. Payment from the insurer is as good as payment from the insured.¹⁰⁸

From the standpoint of a property owner, however, the title insurer's financial commitment is an imperfect substitute for the title the owner believed she was receiving. First, title insurance includes a policy limit, generally set at the purchase price of the property.¹⁰⁹ Title insurance, however, covers losses for as long as the policy holder owns the property.¹¹⁰ Market values can appreciate substantially over that period, but standard title insurance policies provide protection for the purchase price, not for

105. As a California court has put it,

Title insurance is a contract for indemnity under which the insurer is obligated to indemnify the insured against losses sustained in the event that a specific contingency, e.g., the discovery of a lien or encumbrance affecting title, occurs. The policy of title insurance, however, does not constitute a representation that the contingency insured against will not occur.

Lawrence v. Chi. Title Ins. Co., 237 Cal. Rptr. 264, 266 (Ct. App. 1987). See generally BURKE, *supra* note 43, § 2.01(A)(1) (“[N]o title policy is a guarantee of good title. It is not a representation that the title is in any sort of condition, good or bad”); PALOMAR, *supra* note 36, § 1.12 (“That title insurers intend to indemnify insureds, not guaranty title, should be clear from the face of the policy”).

106. BURKE, *supra* note 43, § 2.01(A); PALOMAR, *supra* note 36, § 1.12.

107. BURKE, *supra* note 43, § 6.06; PALOMAR, *supra* note 36, § 1.12.

108. Issues do arise about the lender's right to payment when a prior undiscovered lien impairs the lender's security but does not interrupt the mortgagor's current payments. PALOMAR, *supra* note 36, § 5.15.

109. PALOMAR, *supra* note 36, § 4.2 (face amount of policy is generally the full purchase price); BURKE, *supra* note 43, § 7.01 (discussing face amount as the policy limit).

110. See generally BURKE, *supra* note 43, § 5.02.

market value.¹¹¹ Failure to account for appreciation is of no consequence to a mortgagee, because the amount of the mortgage loan does not increase after closing, but may cause significant loss to a fee owner with equity in the property.

Absent regulation, a title insurer would have inadequate incentive to account for appreciation. State regulation could deal with the problem by requiring insurers to offer policies covering market value at the time of loss. Some states take that approach.¹¹² Others diminish the likelihood that fee owners will suffer losses of appreciation by prohibiting issuance of title insurance policies without a prior examination of title. For instance, the Kansas statute prohibits issuance of a title insurance policy unless the insurer or its agent “has caused to be conducted a reasonable search and examination of the title to the property.”¹¹³ Other states require the insurer to retain records of the search for a period of years.¹¹⁴ In some states, the statute requires that a lawyer or authorized abstractor conduct the search.¹¹⁵ The Alabama statute gives the insurer a choice: cause a title examination to be conducted, or obtain an abstract of title or an opinion of title.¹¹⁶

Some states go further and require that all title insurers maintain, or have access to, a title plant.¹¹⁷ Ownership or participation in a title plant ensures a smaller marginal cost of future title searches, removing a financial incentive to insure without a search. And a title plant requirement is easier to enforce than a requirement that the insurer examine title. Failure to comply with an examination requirement might only be discovered once an adverse claimant appears. The insured would then have the same claim against the title insurer as if the insurer had examined title poorly. In many states the claimant would not be able to recover more for failure to conduct a search because of a rule that the only rights the insured has against a title insurer are contract rights, not tort rights.¹¹⁸

111. Some policies do provide a modicum of protection against inflation, and also give the purchaser the option to purchase an inflation endorsement, but most policies cap the policy protection at 150 percent of the original amount of the policy. PALOMAR, *supra* note 36, § 4.2.

112. See, e.g., N.Y. INS. LAW § 6409(c) (McKinney 2020) (requiring insurers to offer market value policy).

113. KAN. STAT. ANN. § 40-235(b) (2020).

114. See, e.g., CONN. GEN. STAT. § 38a-407 (2020) (ten years); NEV. REV. STAT. § 692A.220 (2020) (five years); N.J. STAT. ANN. § 17:46B-9 (West 2020) (fifteen years); OHIO REV. CODE ANN. § 3953.07 (West 2020) (ten years).

115. See, e.g., WYO. STAT. ANN. § 26-23-308 (2020).

116. ALA. CODE § 27-25-5 (2020).

117. See, e.g., OR. REV. STAT. § 731.438 (2020); IDAHO CODE § 41-2708(1) (2020).

118. For instance, although a New Jersey statute requires title companies to perform a search prior to issuing a title insurance policy, the New Jersey Supreme court has held that once the title company issues a title insurance policy, the company's liability is limited to the policy and the company is not liable for negligence in any title search. *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 562 A.2d 208, 219 (N.J. 1989).

Although these requirements may increase the protection title insurance provides home purchasers against loss of market value and against loss of subjective value,¹¹⁹ those protections come at significant cost. Both a requirement that title insurers conduct a search and a requirement that an insurer maintain a title plant serve as barriers to entry into the title insurance business.¹²⁰ In particular, as public recording data becomes computerized and searchable,¹²¹ the comparative advantage of a privately maintained database diminishes.¹²² As a result, a title plant requirement seems difficult to justify. But even the requirement of a search makes it impossible for upstart insurers who have concluded that title searches are not worth their cost to provide title insurance with less delay and at lower cost.¹²³ In a market where the primary customers—mortgagee banks—do not bear the cost of the product, new entrants with a novel and untested economic model already face significant barriers to entry even without regulatory constraints that make entry impossible. But those new entrants may ultimately provide a path towards assessing (and improving) the efficiency of the title search and title insurance process.

B. Ensuring Adequate Funding

As is true with any insurance product, a title insurance company's potential liability on any individual policy greatly exceeds the premium the insurer collects on that policy. State statutes impose a variety of requirements designed to reduce the likelihood that the insurer will have insufficient funds to pay claims on the policies it issues.

119. Title insurance, like fire and casualty insurance, does not cover loss of subjective value. But, unlike other insurers, title insurers have the capacity, by carefully searching title, to reduce the risk that the insured will suffer any losses at all.

120. See Bruce M. Owen, *Kickbacks, Specialization, Price Fixing, and Efficiency in Residential Real Estate Markets*, 29 STAN. L. REV. 931, 943 (1977) (noting that high capital cost of developing title plants discourages entry); see also Boyer & Nyce, *supra* note 64, at 286.

121. See generally Emily Bayer-Pacht, *The Computerization of Land Records: How Advances in Recording Systems Affect the Rationale Behind Some Existing Chain of Title Doctrine*, 32 CARDOZO L. REV. 337, 340–44 (2010) (discussing computerization of land records).

122. Although a privately maintained database may be less valuable for title search and title insurance purposes, private entities have discovered that complete title records are marketable to advertisers. Deed recorders have been able to finance conversion of records to computerized, searchable form by contracting with private vendors who then charge a monthly fee to subscribers who want access to the county database. See Reid Kress Weisbord & Stewart E. Sterk, *The Commodification of Public Land Records*, 97 NOTRE DAME L. REV. (forthcoming 2021–22).

123. For instance, States Title contrasts itself with traditional title companies by advertising that it will offer a final title commitment in less than one minute for 80 percent of properties. See *Truly Instant Underwriting*, *supra* note 104. States Title's mode of operation would not be permissible in a state that requires a title search before issuing a title policy.

First, many states impose minimum capital requirements as a condition for obtaining a license to enter the title insurance business. California, for instance, requires the insurer to have paid-in capital of \$500,000.¹²⁴

Second, some states often require each title insurer to make a deposit with the state insurance department, ostensibly to guard against insolvency. Like the paid-in capital requirements, the required deposits are so modest that they provide little actual protection to policy holders. For instance, Texas requires a mere \$100,000 deposit, hardly enough to satisfy even one significant claim.¹²⁵

Third, and most significantly, state statutes almost universally require title insurers to maintain a reserve fund.¹²⁶ For every policy the insurer issues, the insurer must deposit into the reserve fund an amount that is not available for ordinary expenses or for distribution to creditors or shareholders.¹²⁷ Statutes vary about how to compute the amount of the reserve; some states require the insurer to set aside a percentage of the face value of all policies issued,¹²⁸ while others compute the reserve as a percentage of premiums collected.¹²⁹ In either event, the insurer is typically entitled to release a portion of the reserve attributable to each policy over a period of time, often twenty years.¹³⁰

These requirements may ensure that funding will be adequate for run-of-the-mill policy claims, but they may not provide complete protection for purchasers of exceptionally large policies. Some states have legislated to guard against the risk that one large claim could render the insurer insolvent.

124. CAL. INS. CODE § 12359 (West 2020). *See also, e.g.*, N.Y. INS. LAW § 6402 (McKinney 2020) (requiring \$500,000 in paid-in capital); TEX. INS. CODE ANN. § 2551.053(a) (West 2020) (\$1,000,000 in paid-in capital); 40 PA. CONS. STAT. § 910-5 (2020) (\$500,000 in minimum paid-in capital).

125. The actual Texas deposit requirement is the lesser of \$100,000 or one-fourth of the authorized capital of the company. TEX. INS. CODE ANN. § 2551.201 (West 2020). *See also* CAL. INS. CODE § 12350 (\$100,000).

126. *See, e.g.*, CAL. INS. CODE § 12382.2; N.Y. INS. LAW § 6405; FLA. STAT. § 625.111 (2020); 40 PA. STAT. § 910-15.

127. *See, e.g.*, CAL. INS. CODE § 12381 (reserve “shall not be subject to distribution among depositors or other creditors or stockholders . . .”); 40 PA. STAT. § 910-14 (same language); N.Y. INS. LAW § 6405(c) (funds must be segregated and must be held solely for the purpose of satisfying policy claims); FLA. STAT. § 625.111 (reserve funds “shall be withdrawn from the use of the insurer for its general purposes, impressed with a trust in favor of the holders of title guarantees and policies . . .”).

128. *See, e.g.*, N.Y. INS. LAW § 6405 (1/80 of 1 percent of face value of policies issued); TEX. INS. CODE § 2551.253(b) (West 2020) (18.5 cents for every \$1,000 of policy liability); 40 PA. STAT. § 910-15(b) (ten cents for each \$1,000 of retained policy liability).

129. *See, e.g.*, CAL. INS. CODE § 12382.2(c) (West 2020) (4 ½ percent of formula focused on premiums written); MICH. COMP. LAWS § 500.7305(2)(b) (2020) (5 percent of premiums).

Florida combines the two methods, basing the reserve on a percentage of face value for smaller and on a percentage of premiums for larger insurers. FLA. STAT. § 625.111.

130. *See, e.g.*, CAL. INS. CODE § 12382.5(c); N.Y. INS. LAW § 6405(a)(2) (McKinney 2020). The two statutes use different formulae, but each formula results in release of the entire reserve attributable to a policy twenty years after the reserve is established.

Oregon, for instance, precludes a title insurer from insuring a risk on one subject of insurance which exceeds 50 percent of the insurer's surplus.¹³¹ New York prohibits a title insurer from "expos[ing] itself to any loss on any one risk in an amount exceeding the sum of its capital, surplus, statutory premium and any voluntary reserves."¹³² Limits like these entrench the market position of the "Big 4" with respect to large commercial transactions; from 2015 through 2018, the Big 4 accounted for 98 percent of all title insurance revenues for commercial transactions with a liability greater than \$20 million.¹³³ Statutes typically permit an insurer to deal with large risks by reinsuring with other title insurers.¹³⁴

Finally, in light of the ill-fated forays of title insurers into the mortgage insurance business,¹³⁵ most states limit the authority of title insurers to depart from their core business.¹³⁶ New York, the site of a number of depression-era defaults, explicitly prohibits title insurers from engaging "in the business of guaranteeing mortgages of real or personal property."¹³⁷

Although all of these restrictions provide protection against insurer insolvency, they also have a less salutary effect: they restrict entry into the title insurance field. Complying with the various capital requirements of all fifty states is difficult for startups. Additionally, the firms most likely to have the solvency and know-how to enter the field—firms engaged in selling other lines of insurance—find themselves explicitly excluded from the title insurance market.

C. Controlling Title Insurance Costs

When market competition is unlikely to generate cost-based pricing, that market failure typically justifies government regulation, and the obvious

131. OR. REV. STAT. § 731.504 (2020). Surplus generally refers to capital available to the insurer beyond those required by law. The Oregon statute unhelpfully defines "surplus to policyholders" to include "in addition to the insurer's capital and surplus . . . any voluntary reserves that are not required pursuant to law" §731.504(6).

132. N.Y. INS. LAW § 6403(c).

133. Complaint at 6, *Fid. Nat'l Fin., Inc.*, F.T.C. Docket No. 9835, F.T.C. File No. 181-0127 (2019) (defining large commercial transactions as those in excess of \$20 million) and at 10 (98 percent captured by Big 4), https://www.ftc.gov/system/files/documents/cases/d09385_fidelity_stewart_administrative_complaint_public_version.pdf [<https://perma.cc/9BSU-TMXG>] [hereinafter FTC Complaint].

According to the 2019 FTC complaint, each of the Big 4 has a surplus, above statutorily-required reserves, greater than \$500 million exceeds \$65 million in surplus. *Id.* at 10.

134. See, e.g., TEX. INS. CODE ANN. §§ 2551.301, 2551.302 (West 2020). As the FTC complaint notes, however, reinsurance adds to complexity and risk, which leads commercial customers to prefer dealing with the Big 4. FTC Complaint, *supra* note 133, at 10.

135. See *supra* Part II.

136. See, e.g., CAL. INS. CODE § 12360 (West 2020); FLA. STAT. § 627.786 (2020); TEX. INS. CODE ANN. § 2502.001 (West 2020).

137. N.Y. INS. LAW § 6408(c) (McKinney 2020).

response is direct regulation of prices. States have taken a variety of approaches to regulating title insurance rates, none with evident success. Title insurance policies are priced substantially above cost nearly everywhere, and what little evidence of a correlation between regulation and price there is suggests that regulating rates exacerbates excessive prices rather than ameliorating them.

1. *State Regulatory Approaches*

State regulation of title insurance rates falls into five categories: no rate regulation, use and file, file and use, prior approval, and promulgated rates.¹³⁸ States with no rate regulation generally regulate other aspects of the title insurance industry, but leave insurers to set their own prices.¹³⁹ In the few use and file states, insurers may set their own prices, but once they set those rates they must file them with the state insurance department, which may intervene if the department concludes that the rates are excessive.¹⁴⁰ In the far more common file and use states, insurers may not issue policies until after they file a rate schedule with the state insurance department, but, as in use and file states, no final approval of the filed rate is required; the state insurance department may intervene if it objects to the filed rates.¹⁴¹ In prior approval states, the insurer proposes rates, but may not use those rates until the state insurance department approves them.¹⁴² Finally, three states have promulgated title insurance rates that bind all carriers.¹⁴³

In file and use states, each insurer is entitled to file its own rate schedules. In a number of file and use states, however, insurers have formed rating agencies which jointly file rates on behalf of all members.¹⁴⁴ The result is that in these states, virtually all insurers charge the same rate. File and use states also vary in the extent to which insurers may deviate from the filed rate, generally to provide customers with discounts from those rates.¹⁴⁵

138. See generally Nielsen, *supra* note 42, at 33–36.

139. The Illinois statute, for instance, expressly precludes state regulation of title insurance fees. 215 ILL. COMP. STAT. § 155/19 (2020). At the same time, Illinois regulates insurers in other ways. See, e.g., 215 ILL. COMP. STAT. § 155/5 (2020) (requiring insurers to obtain a certificate of authority); 215 ILL. COMP. STAT. § 155/11 (2020) (requiring statutory premium reserve).

140. See, e.g., WIS. STAT. § 625.13(1) (2020) (requiring filing of rates within thirty days after they become effective); WIS. STAT. § 625.22 (2020) (authorizing commissioner to disapprove rates). The Wisconsin statute is not specific to title insurance; it applies to all forms of insurance.

141. See, e.g., CAL. INS. CODE §§ 12401.1, 12401.3 (West 2020); N.Y. INS. LAW § 2305(b).

142. See, e.g., N.J. REV. STAT. §§ 17:46B-44, 17:46B-45 (West 2020).

143. TEX. INS. CODE ANN. § 2703.151(a) (West 2020); FLA. STAT. § 627.782 (2020); N.M. STAT. ANN. § 59A-30-6 (2020).

144. See, e.g., TITLE INS. RATE SERV. ASS'N, INC., TITLE INSURANCE RATE MANUAL FOR NEW YORK STATE (2020) [hereinafter N.Y. RATE MANUAL], <http://www.tirsa.org/files/133940067.pdf> [<https://perma.cc/2C93-SGTA>]; TIRBOP Rate Manual, TITLE INS. RATING BUREAU OF PA. <http://patitleratingbureau.org/tirbop-rate-manual/> [<https://perma.cc/XSN5-UAVJ>].

145. See generally Nielsen, *supra* note 42, at 35.

Many filed rate states permit underwriters to negotiate premiums on a transaction-by-transaction basis for large commercial transactions.¹⁴⁶

2. *Correlation Between Regulatory Approaches and Insurance Rates*

One's initial hypothesis might be that in a market where competition is ineffective to generate cost-based pricing, more stringent regulation would generate lower prices. With respect to title insurance, however, there is little evidence to support that thesis.

For reasons already discussed, price comparisons across state lines can be misleading. A more useful approach focuses on whether regulation eliminates or ameliorates the strategies title insurers use to price their product above the cost of production.

First, consider the practice of pricing premiums on higher priced properties at levels disproportionate to increased risk. Recall that doubling the value of the insured property increases the insurer's risk by about 5 percent and increasing value by a factor of ten increases risk by 45 percent. Recall also that in Illinois, the largest state with no regulation on title insurance rates, a \$1,000,000 policy costs 47 percent more than a \$500,000 policy and a \$5,000,000 policy costs 297 percent more than a \$500,000 policy. The numbers are even more damning in other "market rate" states. In Massachusetts, a \$1,000,000 policy from First American costs 100 percent more than a \$500,000 policy, and a \$5,000,000 policy costs 650 percent more than a \$500,000 policy.¹⁴⁷

Compare these rates with those in Texas, the largest state in which a state agency promulgates title insurance rates. The premium for a \$500,000 property is \$2,940.¹⁴⁸ For a \$1,000,000 property, the premium is \$5,575,¹⁴⁹ a 90 percent increase rather than the 5 percent justified by increased risk. For a \$5,000,000 property, the premium is \$22,895,¹⁵⁰ a 679 percent increase rather than the 45 percent increase justified by increased risk.

The story is much the same in New York, the largest state in which rates are filed by a rating agency rather than set by the state. The New York premium for a \$500,000 policy is \$2,391.10,¹⁵¹ while for a \$1,000,000

146. See FTC Complaint, *supra* note 133, at 6.

147. The Massachusetts rate for a \$500,000 policy is \$2,000, for a \$1,000,000 policy is \$4,000, and for a \$5,000,000 property is \$15,000. *Fee Calculator*, *supra* note 82. In Virginia, another market rate state, the comparable rates are \$2,398, \$4,543, and \$14,933. *Id.*

148. *Texas Title Insurance Basic Premium Rates*, TEX. DEP'T OF INS. (Sept. 1, 2019), <https://www.tdi.texas.gov/title/TitleRates2019.html> [<https://perma.cc/9X2R-5M3T>].

The tables provide that for a policy of \$100,001 to \$1,000,000, the premium is \$832 for the first \$100,000, plus .00527 times the balance above \$100,000, for a total of \$2940. *Id.*

149. *Id.*

150. *Id.*

151. See N.Y. RATE MANUAL, *supra* note 144, at 30 (computation from table).

policy, the premium is \$4,281.10,¹⁵² a 79 percent increase, while for a \$5,000,000 policy, the premium is \$18,201.10,¹⁵³ a 661 percent increase. In both Texas and New York, the increase in fees for higher priced properties is even greater than in the largest “market rate” states.¹⁵⁴ Regulation, then, does not appear to have ameliorated above-cost pricing of expensive properties.

Second, promulgated rate states appear to have done somewhat better at limiting the windfall insurers received when consumers simultaneously purchase owner policies and loan policies. In Texas, the upcharge for a loan policy is a flat \$100;¹⁵⁵ in Florida, the upcharge is \$25.¹⁵⁶ Those fees are somewhat smaller than the fees in Illinois, Massachusetts, and Virginia, all of which leave insurers free from price regulation. But the largest file-and-use states, California and New York, are marked by much higher upcharges for simultaneously issued loan policies than either market rate states or promulgated rate states. In New York, for instance, the price for a policy covering a mortgage issued at the time of purchase is 30 percent of the price for the owner’s policy.¹⁵⁷ In California, the additional charge for the loan policy is similar. For instance, First American’s rate for a \$500,000 owner’s policy is \$1,621. If the owner also needs a loan policy for a \$400,000 mortgage, the total cost is \$2,398, despite the absence of any additional cost or risk to the insurer. In both states, the additional charge, which is a function of the size of loan, exacerbates the excessive prices charged for higher-priced properties.

Regulation has generally been ineffective in controlling another area where above-cost pricing predominates: title insurance for a refinanced loan. In general, a loan policy protects the lender for the duration of the loan—often 30 years. But suppose after two years the borrower refinances the loan with the same lender at a lower interest rate. Title insurers require an additional premium, albeit at a discounted rate, for the same period of time that the original policy already covered.

The refinanced mortgage loan, if properly structured, creates minimal additional risk to the tile insurer. Any mortgage or lien created between the original mortgage and the refinanced mortgage will typically be subordinate

152. *Id.*

153. *Id.*

154. In California, the largest file-and-use state without a rating agency, First American’s premium for a \$500,000 policy is \$1,621, while its premium for a \$1,000,000 policy is \$2,524, a 56 percent increase, while its premium for a \$5,000,000 policy is \$5695, a 251 percent increase. *Fee Calculator* (Alameda County), *supra* note 82. Those rates are comparable to the rates in Illinois, which does not regulate rates. See Part III.E, *supra*.

155. *Basic Manual of Title Insurance, Section III, R-5(A)*, TEX. DEP’T OF INS. (Sept. 4, 2019), <https://www.tdi.texas.gov/title/tititem3b.html#r5> [<https://perma.cc/98FS-DVE7>].

156. FLA. ADMIN. CODE ANN. § 690-186.003(5)(a) (2020).

157. See N.Y. RATE MANUAL, *supra* note 144, at Section 10.

to the original mortgage.¹⁵⁸ The only risk the insurer takes is the risk that the lender has erroneously recorded a satisfaction of its loan, and that a subsequent lienor has acted in reliance on that satisfaction.

To guard against that remote possibility, the insurer will conduct a title search. But that search is trivial in scope, covering only the time since the original mortgage loan was issued, and focusing only on the existence or absence of a recorded satisfaction of the mortgage. Once that search is complete, there is no risk to the insurer for which the insurer has not already been paid. Especially in the absence of additional risk, there is no cost justification for a premium proportional to the size of the loan.

Although regulation generally provides for a “discount” on refinanced loans, the authorized rates are still proportional to the size of the loan, and are at rates that reflect far more than the cost of a modest additional title search. In Florida, for instance, the discounted rate is more than 50 percent of the original rate.¹⁵⁹ In Texas, another promulgated rate state, the discounted rate is 50 percent of the original loan rate if the refinance occurs within four years of issuance of the original policy, and 75 percent if four to eight years have elapsed.¹⁶⁰ In New York, where a rating agency sets the rate, the premium for a refinance policy for a one- to four-family home is 35 percent of the original loan rate for a policy in the amount of \$475,000 or less, and 49 percent of the original loan rate for larger loan policies.¹⁶¹ Regulation, then, does not account for the limited additional cost an insurer incurs when insuring a refinanced loan.

Whether existing regulation has, overall, exercised any downward pressure on rates remains a matter of conjecture. At least one study concludes that title insurance prices tend to be higher in promulgated rate states.¹⁶² The disparity, if there is one, may be the product of asymmetric

158. See RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES §7.3(a) (AM. L. INST. 2021):

If a senior mortgage is released of record and, as part of the same transaction, is replaced with a new mortgage, the latter mortgage retains the same priority as its predecessor, except

(1) to the extent that any change in the terms of the mortgage or the obligation it secures is materially prejudicial to the holder of a junior interest in the real estate, or

(2) to the extent that one who is protected by the recording act acquires an interest in the real estate at a time that the senior mortgage is not of record.

159. Compare FLA. ADMIN. CODE ANN. § 690-186.003(1), with FLA. ADMIN. CODE ANN. § 690-186.003(2). Using the tables in the regulations, the premium for an original \$500,000 loan policy would be \$2,575. For a refinance of the same loan, the premium would be \$1,530.

160. *Basic Manual of Title Insurance, Section III*, *supra* note 155, at R-8. The Texas regulations provide for a “credit” against the basic loan rate. The credit is not applicable when a loan is refinanced more than eight years after issuance of the original loan policy. *Id.*

161. See N.Y. RATE MANUAL, *supra* note 144, at Section 12A. Section 12A provides that, for one- to four-family homes, the insured is entitled to a 30 percent discount off the refinance rate specified in Section 12, which is 50 percent of the original loan rate for policies in amounts of \$475,000 or less, and 70 percent of the original loan rate for larger policies.

162. EATON, TITLE REGULATION IN TEXAS, *supra* note 80, at 90–94.

information: insurers in those states have an incentive to report high costs to justify promulgation of higher rates. Because the parties who ultimately bear the cost of title insurance are largely one-time consumers, no effective lobbying group emerges to challenge excessive rates. The same structural problem that prevents the market from disciplining title insurance rates may be even more of an issue in the legislative arena, where, as the next section illustrates, the primary activity has been in regulating abusive practices, not rates.

D. Restrictions on Kickbacks and Referral Fees

Most states have enacted statutes that restrict payment of kickbacks and referral fees by title insurers. Most of these statutes were enacted after Congress enacted RESPA, and many track RESPA's prohibitions. Some of the statutes target abuses other than the payment of money. California's statute, for instance, explicitly prohibits payment for promotional materials to be used by referral sources¹⁶³—the subterfuge title insurers have used in cases like *Obiefuna v. Hypotec, Inc.*¹⁶⁴ Utah's administrative code prohibits insurers from providing space to referral sources without receiving fair rental value.¹⁶⁵

New York has been particularly aggressive in prohibiting payments even when those payments are not *quid pro quo* payments in return for referrals. After a state department of financial services investigation turned up excessive entertainment expenses by title insurers, including one insurer who spent from \$2.5 million to \$5.4 million per year on tickets to basketball, baseball, and tennis events for potential referral sources and another who reported spending 50 percent of its revenue on meals for referral sources, the department promulgated more stringent regulations.¹⁶⁶ Those regulations listed tickets to sporting events, outings, and parties as impermissible inducements for title insurance clients and prospective clients, “regardless of whether provided as a quid pro quo for specific business.”¹⁶⁷ The state's Appellate Division upheld the regulation over an industry challenge that the regulation exceeded the department's statutory authority.¹⁶⁸

163. CAL. INS. CODE § 12405.7(a) (West 2020).

164. *Obiefuna v. Hypotec, Inc.*, 451 F. Supp. 3d 928 (S.D. Ind. 2020). For discussion, see *supra* Section III.F.

165. UTAH ADMIN. CODE r. 592-6-4(9) (LexisNexis 2021).

166. See *N.Y. State Land Title Ass'n, Inc. v. N.Y. State Dep't of Fin. Servs.*, 92 N.Y.S.3d 49, 54 (App. Div. 2019).

167. *Id.* For the regulatory text, see 11 N.Y. COMP. CODES R. REGS. tit. 11, § 228.2 (2020).

168. *Id.*

As already noted, however, title insurers and their referral sources can avoid kickback prohibitions by arranging common ownership of the title agency and its referral source.¹⁶⁹ Even the most stringent state anti-kickback statutes do not prohibit common ownership.

Kickback prohibitions do not typically reduce prices for consumers of title insurance. Given almost nonexistent price competition and significant barriers to entry, a prohibition on kickbacks would act primarily to increase the profits of title insurers who would not have to share revenues with referral sources.¹⁷⁰ Those increased profits could generate inefficient overinvestment in the title insurance market¹⁷¹ were it not for the barriers to entry already discussed. Only if state regulators carefully and accurately monitored the real costs of title insurers—and set prices accordingly—would kickback restrictions result in benefit to consumers. Experience suggests, however, that state regulators have neither the capacity nor the appropriate incentives to engage in that level of monitoring.

IV. FEDERAL REGULATION

Federal intervention has the potential to compensate for ineffective state regulation of the title insurance industry. In practice, however, neither the federal antitrust laws nor the Real Estate Settlement Procedures Act (RESPA) has effectively constrained industry pricing abuses. Recent efforts to cast title insurance abuses as violations of the Racketeer Influenced and Corrupt Organization Act (RICO) seem unlikely to fare much better.

A. Antitrust Law

Horizontal price-fixing by industry competitors generally constitutes a per se violation of the Sherman Act.¹⁷² In states where rating agencies file rates on behalf of multiple title insurers, the price-fixing claim is particularly strong. In other states, the existence of identical prices may be the result of price-fixing, but might also be the product of tacit collusion or conscious parallelism, which, by itself, does not violate the antitrust laws.¹⁷³ In two

169. See *supra* Part II.E.

170. See Owen, *supra* note 120, at 950.

171. *Id.*

172. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940). See also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (reaffirming that horizontal price-fixing constitutes a per se antitrust violation).

173. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (citations omitted) (“Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level . . .”).

recent cases related to the All Star kickback scheme, district courts have allowed Sherman Act claims to survive motions to dismiss based on documents allegedly establishing explicit price-fixing between title insurance competitors.¹⁷⁴ But in the more common case where title insurance pricing is the product of explicit cooperation among industry players, three related doctrines have effectively insulated the practice from federal antitrust review. First, in states that promulgate title insurance rates, the state action doctrine exempts those rates from the Sherman Act's prohibitions. Second, the McCarran-Ferguson Act explicitly cedes to the states most regulatory authority over the insurance business. Third, the judicially-developed filed-rate doctrine has led federal courts to abstain from reviewing rates filed with state regulatory authorities.

None of these doctrines precludes government intervention, pursuant to the Clayton Act, to stop anticompetitive mergers within the title insurance industry. Department intervention has led to restructuring or abandonment of several proposed mergers. That intervention has, at best, modestly slowed concentration in the industry.

1. *The State Action Doctrine*

The state action doctrine traces its roots to *Parker v. Brown*,¹⁷⁵ a case in which the Supreme Court dismissed an antitrust claim by a California raisin producer challenging a state-designed program to stabilize raisin prices by restraining competition. The Court concluded that the Sherman Act was not “intended to restrain state action or official action directed by a state,”¹⁷⁶ and held that California “imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.”¹⁷⁷

In *Federal Trade Commission v. Ticor Title Ins. Co.*,¹⁷⁸ the Court held that the state action doctrine would not immunize insurance price-fixing from antitrust liability unless the price-fixing was the result of active state supervision of rates. The Federal Trade Commission (FTC) had filed an administrative complaint charging title insurance companies with price-fixing for title searches and examinations. The complaint focused on states in which a rating bureau filed rates for title searches and examinations, and the rates became effective unless the state rejected them within a specified

174. *Wilson v. Eagle Nat'l Bank*, No. 20-1344, 2021 WL 1238576, at *4 (D. Md. 2021) (relying on cost estimate suggesting that companies directly or indirectly shared pricing information and reached an agreement on their prices); *Kadow v. First Fed. Bank*, No. 19-cv-00566, 2020 WL 5230560, at *7–*8 (D. Md. 2020) (relying on email susceptible of multiple constructions).

175. *Parker v. Brown*, 317 U.S. 341 (1943).

176. *Id.* at 351.

177. *Id.* at 352.

178. *Fed. Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).

period.¹⁷⁹ The title insurers invoked both the state action doctrine and the McCarran-Ferguson Act in contending that the price-fixing was immune from antitrust scrutiny.¹⁸⁰ The Commission had concluded that none of the states had exercised sufficient supervision to justify application of the state action doctrine, but the Third Circuit reversed and held that state supervision of the rate-making process was sufficient to entitle the insurers to state action immunity.¹⁸¹

In reversing, the Supreme Court focused on the regulatory scheme of two states—Wisconsin and Montana—and concluded that in both states “the potential for state supervision was not realized in fact.”¹⁸² In both states, the rate filing submitted by the rating bureau took effect even though the rating bureau failed to provide information required by the state.¹⁸³ The state action in those states failed the test articulated by the court: when the state permits private parties to set rates subject to a state veto, “the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate-setting scheme.”¹⁸⁴ As the Court has recently reaffirmed, quoting *Ticor Title*, the “mere potential for state supervision is not an adequate substitute for a decision by the State.”¹⁸⁵

Ticor Title limits the availability of the state action defense in the majority of states with use and file or file and use schemes for regulating title insurance rates—unless the insurers produce evidence that state regulators actually scrutinize the filed rates. The Supreme Court’s opinion in *Ticor Title* did not, however, address the scope of the McCarran-Ferguson exemption.

2. *The McCarran-Ferguson Act*

The McCarran-Ferguson Act provides that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any

179. *Id.* at 629. The complaint had initially focused on thirteen states, but the FTC subsequently declined to pursue the complaint with respect to all but six. *Id.* at 628. By the time the case reached the Supreme Court, the FTC had abandoned its complaint with respect to two of those states. *Id.*

180. *Id.* at 627. The insurers also relied on the Noerr-Pennington doctrine, which insulates joint efforts to influence public officials from the antitrust laws. *Id.* The ALJ held the doctrine inapplicable. *Id.* at 628.

181. *Ticor Title Ins. Co. v. Fed. Trade Comm’n*, 922 F.2d 1122 (3d Cir. 1991), *rev’d*, 504 U.S. 521 (1992).

182. *Ticor Title*, 504 U.S. at 638.

183. In Montana, the rating bureau failed to provide additional requested information. In Wisconsin, the bureau provided information after a lapse of seven years, during which the filed rate remained in effect. *Id.*

184. *Id.*

185. *N.C. Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 574 U.S. 494, 515 (2015) (quoting *Ticor Title*, 504 U.S. at 638).

State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.”¹⁸⁶ The statute was enacted in 1945, a year after the Supreme Court held that the Sherman Act could, under the Commerce Clause, regulate the fire insurance business.¹⁸⁷ Both the insurance industry and the states lobbied for the legislation. The states feared that the Supreme Court might take the next step and invalidate state taxation and licensing laws that were a significant revenue source.¹⁸⁸

The statute’s exemption applies only if the state regulates, and only if that regulation is of the “business of insurance.” Courts have generally held that state regulated title insurance premiums satisfy both conditions.

Not all activities of title insurance companies fall within the scope of the “business of insurance.”¹⁸⁹ In *Ticor Title* itself, the FTC challenged rates charged for title search and title examination—not premiums for insurance. On remand from the Supreme Court, the Third Circuit held the McCarran-Ferguson exemption inapplicable because title search and examination does not spread or transfer risk.¹⁹⁰ The court also noted that title search and title examination were “historically independent of the business of insurance” and indicated that the fact that insurance companies now provide those services did not make them the “business of insurance” within the meaning of the McCarran-Ferguson Act.¹⁹¹

If, however, title insurers file rates that cover insurance, the premiums fall within the scope of the “business of insurance” even if the bulk of the premium reflects the cost of ascertaining title. In *Katz v. Fidelity Nat’l Title Ins. Co.*,¹⁹² the Sixth Circuit conceded that title insurance policies were priced “well above most estimates of the risk involved,” but concluded that “[r]igid insistence on substantial risk-spreading is not required.”¹⁹³ In other words, so long as title insurers bundle the cost of search and examination

186. 15 U.S.C. § 1012(b).

187. *United States v. S.E. Underwriters Ass’n*, 322 U.S. 533 (1944). In upholding indictments for violating the Sherman Act by fixing fire insurance premiums, the Court held both that the Sherman Act intended to prohibit insurers from restraining or monopolizing the fire insurance trade, and that insurance transactions which stress across state lines constitute commerce within the meaning of the Commerce Clause. *Id.* at 538–39.

188. On the legislative history of the statute, see Larry D. Carlson, *The Insurance Exemption from the Antitrust Laws*, 57 TEX. L. REV. 1127, 1132–39 (1979). See also Alan M. Anderson, *Insurance and Antitrust Law: the McCarran-Ferguson Act and Beyond*, 25 WM. & MARY L. REV. 81, 85–89 (1983).

189. What constitutes the “business of insurance” within the meaning of the statute may vary with context. See Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L. REV. 13, 22–24 (1993).

190. *Ticor Title Ins. Co. v. Fed. Trade Comm’n*, 998 F.2d 1129, 1133–34 (3d Cir. 1993).

191. *Id.* at 1137–38. See also *United States v. Title Ins. Rating Bureau of Ariz., Inc.* 517 F. Supp. 1053 (D. Ariz. 1981) (holding that McCarran Act did not insulate rates for provision of escrow services from antitrust review because escrow services were not the business of insurance), *aff’d*, 700 F.2d 1247 (9th Cir. 1983).

192. *Katz v. Fid. Nat’l Title Ins. Co.*, 685 F.3d 588 (6th Cir. 2012).

193. *Id.* at 593.

with the cost of insurance, the combined product qualifies as within the “business of insurance”—avoiding the problem in *Ticor Title*.

The Sixth Circuit’s opinion in *Katz* also held that the “state regulation” component of the McCarran-Ferguson exemption was satisfied because the Ohio Revised Code included a title regulating insurance.¹⁹⁴ The court devoted no attention to the nature or content of the Ohio regulation; the existence of the statute was, in the court’s view, sufficient to bar the antitrust claim.¹⁹⁵ Although the court’s conclusion was consistent with several cases decided before the Supreme Court’s opinion in *Ticor Title*,¹⁹⁶ it is reasonable to ask whether the Court’s approach in *Ticor Title*—requiring active state supervision of the rate setting process to qualify for the state action exemption—might apply with equal force to the McCarran-Ferguson exemption. The Sixth Circuit, however, apparently saw no connection between the two exemptions.

3. The Filed-Rate Doctrine

Rather than relying on the McCarran-Ferguson Act, some courts have invoked the filed-rate doctrine to dismiss private antitrust suits challenging price-fixing by title insurers. A broad interpretation of that doctrine provides that when rates have been filed with a government agency, private plaintiffs may not recover treble damages on claims that those rates were the product of price-fixing in violation of the Sherman Act.¹⁹⁷ Unlike the McCarran-Ferguson exception, the filed-rate doctrine does not entirely insulate defendants from the antitrust laws. Instead, the doctrine operates to limit available remedies, thereby reducing the incentive to challenge the rates.¹⁹⁸

194. *Id.* at 592, 595.

195. The court wrote:

Title XXXIX of the Ohio Revised Code regulates insurance. See Ohio Rev. Code § 3901.01 (creating department of insurance); *id.* at §§ 3901.01–3999.99. Accordingly, the McCarran-Ferguson Act bars Appellants’ federal antitrust action if title insurance is “the business of insurance” within the meaning of the Act.

Id. at 592 (citing 15 U.S.C. § 1012(a)–(b)).

196. See *Laws. Title Co. of Mo. v. St. Paul Title Ins. Corp.*, 526 F.2d 795, 797 (8th Cir. 1975) (citations omitted) (“[T]he McCarran Act exemption does not depend on the zeal and efficiency displayed by a state in enforcing its laws. Congress has provided that exemption whenever there exists a state statute or regulation capable of being enforced. . . . Once the existence of such regulatory authority has been ascertained, federal enforcement must yield to the state.”); see also *Crawford v. Am. Title Ins. Co.*, 518 F.2d 217 (5th Cir. 1975).

197. Courts apply the filed-rate doctrine to claims other than antitrust claims. See, e.g., *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214 (1998) (applying filed-rate doctrine to preempt state law claims). For present purposes, the focus is on the doctrine’s application to antitrust claims.

198. See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422 (1986) & esp. n.28 (distinguishing between holding that activity enjoys absolute immunity and holding that treble damage remedy is not available).

The Supreme Court first applied the doctrine in *Keogh v. Chicago & Northwestern Railway Co.*,¹⁹⁹ and declined to abandon it in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*²⁰⁰ In both cases, the Court dismissed private antitrust claims brought by shippers alleging that rates filed with the Interstate Commerce Commission (ICC) had been fixed by an agreement among carriers. In *Keogh*, the ICC had approved the rates after public hearing; in *Square D*, the fixed rates took effect without any formal hearing.²⁰¹

Although *Keogh* and *Square D* both involved rates filed with the ICC, lower federal courts have applied the doctrine to rates filed with the Federal Energy Regulatory Commission,²⁰² and some have extended the doctrine to rates filed with state public service commissions.²⁰³

A number of courts have applied the filed-rate doctrine to dismiss price-fixing claims against title insurers.²⁰⁴ Two Third Circuit opinions, *McCray v. Fidelity Nat'l Title Ins. Co.*²⁰⁵ and *In re New Jersey Title Ins. Litigation*,²⁰⁶ decided the same day by the same panel, treated the issue most extensively. In *McCray*, the court affirmed the district court's dismissal of a price-fixing claim brought by title insurance purchasers against Delaware title insurers. Although the district court had relied both on the McCarran-Ferguson Act and the filed-rate doctrine,²⁰⁷ the Third Circuit relied only on the filed-rate doctrine, rejecting insurance purchasers' argument that the doctrine should apply only when an agency meaningfully reviews the filed rates—a standard

199. *Keogh v. Chi. & N.W. Ry. Co.*, 260 U.S. 156 (1922).

200. *Square D*, 476 U.S. 409 (1986).

201. *Id.* at 417. In his opinion for the Court in *Keogh*, Justice Brandeis offered two justifications for the doctrine. First, if a shipper could recover in an antitrust action, that shipper would obtain a preference over other shippers, resulting in unjust discrimination. 260 U.S. at 163. Second, in light of the regulatory authority conferred on the ICC, a court would not be capable of determining what rate the carrier could lawfully have charged absent the challenged conspiracy. *Id.* at 163–64.

The Court also noted that it was unclear whether the plaintiff-shipper would have benefitted at all from a lower rate; if all carriers had received a lower rate, the benefit might have been passed on to customers or to the ultimate consumers. *Id.* at 165.

202. See, e.g., *Breiding v. Eversource Energy*, 939 F.3d 47 (1st Cir. 2019); *Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303 (3d Cir. 2004); *County of Stanislaus v. Pac. Gas & Elec. Co.*, 114 F.3d 858 (9th Cir. 1997).

203. *Texas Com. Energy v. TXU Energy, Inc.*, 413 F.3d 503 (5th Cir. 2005); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 402 (7th Cir. 2000).

204. *McCray v. Fid. Nat'l Title Ins. Co.*, 682 F.3d 229, 235–44 (3d Cir. 2012); *In re N.J. Title Ins. Litig.*, 683 F.3d 451, 454–60 (3d Cir. 2012); *Dolan v. Fid. Nat'l Title Ins. Co.*, 365 F. App'x 271, 273–76 (2d Cir. 2010); *Winn v. Alamo Title Ins. Co.*, 372 F. App'x 461 (5th Cir. 2010).

205. *McCray*, 682 F.3d 229.

206. *In re New Jersey Title Ins. Litig.*, 683 F.3d 451.

207. The District Court dismissed the damages claim based on the filed-rate doctrine, granting purchasers leave to amend to assert a claim for injunctive relief. *McCray v. Fid. Nat'l Tit. Ins. Co.*, 636 F. Supp. 2d 322 (D. Del. 2009), *aff'd*, 682 F.3d 229 (3d Cir. 2012). The court then invoked the McCarran-Ferguson Act to dismiss the amended complaint seeking injunctive relief. *McCray v. Fid. Nat'l Title Ins. Co.*, No. 08–775, 2010 WL 3023164 (D. Del. July 29, 2010), *aff'd*, 682 F.3d 229 (3d Cir. 2012).

they argued the Delaware Department of Insurance did not meet.²⁰⁸ The court acknowledged an earlier Ninth Circuit decision holding the filed-rate doctrine inapplicable when state law provided no meaningful review of title insurance rates,²⁰⁹ but emphasized that “the Supreme Court has never indicated that the filed-rate doctrine requires a certain type of agency approval or level of regulatory review.”²¹⁰ The court observed that in *Square D* itself, the statute “did not require the ICC to affirmatively approve freight transportation rates.”²¹¹ Moving from doctrine to policy, the court focused on the relative institutional competence of agencies and courts in the ratemaking process, noting that to award damages, the trial court would have to calculate the legal title insurance rate but for the alleged antitrust violation.²¹² That calculation would embroil the courts in the ratemaking process, defeating a core purpose of the filed-rate doctrine. The court’s opinion in *In re New Jersey Title Insurance Litigation* provided similar analysis in dismissing price-fixing claims with respect to New Jersey title insurance rates.

The divergence between *Ticor Title*’s insistence on active supervision before an insurer can invoke treatment of the state action defense and judicial rejection of a meaningful review standard in the filed-rate and McCarran-Ferguson cases is striking, but the Court’s opinion in *Square D* provides some doctrinal support for that divergence. The upshot, however, is that as currently construed, the McCarran-Ferguson Act and the filed-rate doctrine, taken in tandem, present formidable obstacles to title insurance purchasers advancing antitrust challenges to price-fixing practices in the title insurance industry.

4. Mergers and the Clayton Act

Although the McCarran-Ferguson Act might exempt state-regulated price-fixing from antitrust liability, the statute does not exempt title insurers from the Clayton Act’s prohibition on acquisitions of competitors that would substantially “lessen competition, or to tend to create a monopoly.”²¹³ In 1965, in *United States v. Chicago Title and Trust Co.*,²¹⁴ a federal district court rejected the argument that the McCarran-Ferguson Act insulated title insurance mergers from Clayton Act scrutiny. The court held that state

208. *McCray*, 682 F.3d at 237.

209. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992).

210. *McCray*, 682 F.3d at 238.

211. *Id.*

212. *Id.* at 242.

213. 15 U.S.C. § 18.

214. 242 F. Supp. 56 (N.D. Ill. 1965).

regulation of the title insurance industry did not bar the government's antitrust challenge to the Chicago Title's acquisition of Kansas City Title.

Subsequently, in *Group Life & Health Insurance Co. v. Royal Drug Co.*,²¹⁵ the Supreme Court held that the McCarran-Ferguson Act's "exemption is for the 'business of insurance,' not the 'business of insurers.'"²¹⁶ *Royal Drug* itself was a Sherman Act case, but the Court indicated more broadly that "underwriting or spreading of risk [is] an indispensable characteristic" of insurance.²¹⁷ As a result, the Court held that the challenged agreements fixing the retail price of drugs did not qualify for the exemption because they involved the purchase of goods and services from entities outside the insurance industry.²¹⁸ In light of *Royal Drug*, it is clear that title insurance combinations are not exempt from antitrust scrutiny.

In recent decades, the FTC has occasionally intervened in proposed title insurance combinations, generally to require divestiture of title plants as a condition of approval.²¹⁹ That government intervention has not significantly slowed consolidation in the industry which now leaves four entities with more than 85 percent of the title insurance business. Most recently, however, the threat of government intervention caused the collapse of a proposed merger between Fidelity and Stewart, two of the industry's remaining "Big Four."²²⁰ Given the level of state-sanctioned cooperation among competitors, it is not clear how much effect federal efforts to block further consolidation would have.

215. 440 U.S. 205 (1979).

216. *Id.* at 211.

217. *Id.* at 212.

218. *Id.* at 224. In *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982), the Court distilled the *Royal Drug* analysis into "three criteria relevant in determining whether a particular practice is part of the 'business of insurance' exempted from the antitrust laws by § 2(b): *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry."

219. See, e.g., Press Release, Fed. Trade Comm'n, FTC Puts Conditions on Fidelity National Financial's Acquisition of Lender Processing Services (Dec. 24, 2013), <https://www.ftc.gov/news-events/press-releases/2013/12/ftc-puts-conditions-fidelity-national-financials-acquisition> [<https://perma.cc/6QTZ-GXH7>] (requiring Fidelity to sell title plant assets); Press Release, Fed. Trade Comm'n, Fidelity National Financial Settled FTC Charges that Its Acquisition of LandAmerica Subsidiaries Reduced Competition in Title Information Markets (July 16, 2010), <https://www.ftc.gov/news-events/press-releases/2010/07/fidelity-national-financial-settles-ftc-charges-its-acquisition> [<https://perma.cc/F5C8-2HSD>] (requiring sale of several title plants as condition of acquisition); see also Press Release, Fed. Trade Comm'n, Washington DC-based Title Plant Agrees to Settle FTC Charges (Aug. 26, 1998), <https://www.ftc.gov/news-events/press-releases/1998/08/washington-dc-based-title-plant-agrees-settle-ftc-charges> [<https://perma.cc/72TL-3G8T>] (proposed consent order precluding consolidation of title plants).

220. See Complaint, Fid. Nat'l Fin., Inc., F.T.C. Docket No. 9835, F.T.C. File No. 181-0127 (2019), https://www.ftc.gov/system/files/documents/cases/d09385_fidelity_stewart_administrative_complaint_public_version.pdf [<https://perma.cc/9BSU-TMXG>]; see generally Small, *supra* note 41.

B. RESPA

1. Introduction

Concerns about settlement costs on purchases with federally-insured mortgages prompted Congress to enact the Real Estate Settlement Procedures Act (RESPA) in 1974.²²¹ Rather than regulating costs directly, Congress opted for an approach that emphasized advance disclosure of settlement costs, together with a prohibition on industry practices Congress considered abusive—particularly referral fees and kickbacks. RESPA regulates a variety of charges borrowers face at a real estate closing, but practices in the title insurance industry were one of the statute’s prime targets.

The focus on disclosure ignored a basic fact: most purchasers would not have the time or understanding to take steps to reduce costs once they were disclosed. In addition, at least with respect to title insurance, it has never been clear that kickbacks and referral fees bear primary responsibility for inflated rates. Collaboration among insurers, combined with indifference and presumed impotence by consumers, almost certainly plays a more significant role. RESPA has generated considerable litigation challenging kickbacks in the industry, but the litigation has generated at best modest success in restraining kickbacks and referral fees. Perhaps more important, the statute’s design limits its potential as a mechanism for controlling title insurance cost.

2. The Statutory Scheme

a. Disclosure

The most significant of RESPA’s disclosure provisions requires a mortgage lender to provide a prospective borrower with a good faith estimate (now called a “loan estimate”) of charges for specific settlement services.²²² Implementing regulations require the lender to provide that

221. See 12 U.S.C. § 2601(a) (Congressional findings and purpose).

222. 12 U.S.C. § 2604(c). The statute, together with the Truth in Lending Act and implementing regulations, also requires preparation of a settlement statement that includes all charges imposed on the borrower. Because that statement—the HUD-1—is not delivered until closing, it is not calculated to have an effect on the borrower’s decisions.

The Dodd-Frank Act required the CFPB to develop model disclosures that combined forms required under TILA and RESPA into a single integrated disclosure. 12 U.S.C. § 5532(f). The CFPB adopted rules replacing the good faith estimate form with a “Loan Estimate” form. See Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 Fed. Reg. 79,730 (Dec. 31, 2013) (codified at 12 C.F.R. §§ 1024, 1026 (2020)), https://files.consumerfinance.gov/f/201311_cfpb_final-rule_integrated-mortgage-disclosures.pdf [<https://perma.cc/3RD6-HNPQ>].

estimate within three business days after receiving a loan application.²²³ With respect to an array of charges including required title insurance and owner's title insurance, the sum of the charges at settlement may not exceed the sum of the estimates by more than 10 percent.²²⁴

b. Anti-Kickback Provisions

The heart of RESPA is its prohibition on giving or accepting "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a real estate settlement service . . . shall be referred to any person."²²⁵ The statute goes on to prohibit splitting of charges received for rendering of real estate settlement services "other than for services actually performed."²²⁶ The statute's broad prohibition, however, is substantially qualified by safe harbor provisions that insulate a variety of industry practices from the statute's reach.

Two safe harbors are particularly critical. The first exempts payments to lawyers for services actually rendered and payments by title companies to its agents for services actually performed.²²⁷ The second exempts "affiliated business arrangement[s]"—those in which a referral source has an ownership stake in a provider of settlement services²²⁸—so long as the arrangement meets statutory qualifications. Those qualifications include first, disclosure of the arrangement and the range of charges generally made by the provider; second, the person referred is not required to use any particular provider; and third, the only thing of value received from the arrangement "is a return on the ownership interest or franchise relationship"²²⁹

c. Remedies

A person who violates RESPA's prohibition on kickbacks is liable for fines, imprisonment, and injunctive relief in a federal or state enforcement

223. 12 C.F.R. § 1024.7(a).

224. 12 C.F.R. § 1024.7(e)(2). The provision applies only when the borrower uses a settlement service provider identified by the lender. *Id.*

225. 12 U.S.C. § 2607(a). The statute applies to all settlement services "involving a federally related mortgage loan," a term that includes all transactions involving a mortgage made by a lender whose deposits are insured by an agency of the federal government. § 2602(1)(B)(i), 2602(7).

226. § 2607(b).

227. § 2607(c)(1)(A), (c)(1)(B).

228. Subsection 2602(7) defines an affiliated business arrangement to include one in which a referral source "has either an affiliate relationship with or [a] direct or beneficial ownership interest of more than 1 percent in a provider of settlement services" and "directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider."

229. § 2607(c)(4)(C).

action.²³⁰ The statute also creates a private right of action, and explicitly provides that a person charged for settlement services by anyone who has violated the statute may recover “an amount equal to three times the amount of any charge paid for such settlement service[s].”²³¹ The statute also provides that the court may award attorneys’ fees to the prevailing party.²³²

3. *The Statute in Operation*

For both substantive and procedural reasons, RESPA has promised more than it has delivered as a vehicle for controlling title insurance costs. Furthermore, the Supreme Court’s recent pronouncements on Article III standing threaten to limit the statute’s effectiveness even further.

b. Substantive Issues

Few title agencies are likely to make direct payments to referral sources in flagrant violations of RESPA’s anti-kickback provisions. The practices that generate litigation are more subtle. Even the most obvious schemes typically involve allegations that the title agency arranged for services to be provided for the benefit of the referral source.²³³ Those allegations then require resolution of fact issues about whether the services were for the benefit of the agency itself or the referral source.

Litigation in a number of other cases has focused on whether a discounted rate constitutes a kickback within the meaning of the statute. Providing a discounted title insurance rate to a mortgage lender who funnels business to the title insurer has some of the hallmarks of a kickback, with one significant difference: the discount actually benefits purchasers who use that lender and who ultimately pay the insurance premium. Perhaps that fact colored the Ninth Circuit’s holding in *Lane v. Residential Funding Corp.*,²³⁴ that Chicago Title’s agreement to provide title insurance to a lender for 60 percent of the standard price did not constitute a prohibited referral fee.²³⁵ The court concluded that the discounts were reasonably related to the value

230. Subsection 2607(d)(1) provides for fines and imprisonment; subsection 2607(d)(4) authorizes actions for injunctive relief by federal officials “or the insurance commissioner of any State.”

231. § 2607(d)(2).

232. § 2607(d)(5).

233. See, e.g., *Obiefuna v. Hypotec, Inc.*, 451 F. Supp. 3d 928 (S.D. Ind. 2020).

234. 323 F.3d 739 (9th Cir. 2003).

235. The lender also negotiated a flat escrow fee from Chicago Title, and the purchaser took advantage of the discounted fees (a fact the court mentioned but did not emphasize). *Id.* at 740–41. The purchaser asked the lender to use a different title insurer, but the lender refused to proceed with the sale unless the purchaser used Chicago Title. The court did not discuss why the lender’s insistence on using Chicago Title did not constitute a separate violation of RESPA, despite the court’s notation, in a footnote, that RESPA prohibits sellers from requiring buyers to use particular title insurance companies. *Id.* at 746 n.8.

of services the title insurer actually performed, in part because of the economies of scale resulting from lender's repeat business.²³⁶

A second issue is whether a title insurer who charges more than state law permits has engaged in an unlawful splitting of fees. Although a number of purchasers have attempted to use RESPA's prohibition on fee splitting as a basis for challenging overcharges by title insurers, courts have uniformly rejected those challenges.²³⁷ Purchasers in these cases have argued that the title insurers were not entitled to collect more than the rate authorized by state statute. As a result, any overcharge was not for services performed. Since the insurance premium (and hence the overcharge) was split between the title insurer and its agent, the overcharge violated RESPA's prohibition on splitting charges "other than for services performed."²³⁸ In dismissing these claims, courts have refused to separate the lawful charge from the overcharge and have held that because the purchasers received title insurance in return for payment, the payment was for services performed.²³⁹

A third issue involves the scope of RESPA's safe harbors. Vertical integration between title insurer and referral source is one mechanism for avoiding RESPA's anti-kickback prohibition, and RESPA's safe harbor for affiliated business arrangements extends to cover partial integration. In a number of cases, a referral source acquires an interest in a title agency, and the agency then pays dividends to the referral source. RESPA's safe harbor provision for affiliated business arrangements explicitly exempts those payments, which might otherwise qualify as kickbacks, so long as the statutory requisites are met.²⁴⁰ As a result, litigation has often centered on fact-intensive issues: whether disclosure of the arrangement to the consumer met statutory and regulatory standards,²⁴¹ and whether the consumer was given a choice of title insurers.²⁴²

236. *Id.* at 742–43. The lender's residential sales generally involved recent foreclosures which, the court observed, reduced the extent of any title search. *Id.* at 741.

237. *See, e.g.,* *Arthur v. Titor Title Ins. Co. of Fla.*, 569 F.3d 154 (4th Cir. 2009); *Hazewood v. Found. Fin. Grp., LLC*, 551 F.3d 1223 (11th Cir. 2008).

238. *Hazewood*, 551 F.3d at 1224–25.

239. *See id.* at 1225–26; *Arthur*, 569 F.3d at 159–60.

240. The statute requires disclosure of the arrangement, assurance, that the purchaser is not required to sue any particular provider, and that the only thing of value provided is "a return on the ownership interest or franchise relationship . . ." 12 U.S.C. § 2607(c)(4)(C).

241. *See Lannin v. NRT Title Agency, LLC*, No. 18-15146, 2019 WL 4055389 (D.N.J. Aug. 27, 2019) (claim dismissed because plaintiff failed to establish that disclosure was inadequate); *White v. JRHBW Realty Inc.*, No. 14-cv-01436, 2015 WL 5470245 (N.D. Ala. Sept. 16, 2015) (notice adequate even if not in exact form prescribed by regulation); *Toldy v. Fifth Third Mortg. Co.*, 721 F. Supp. 2d 696 (N.D. Ohio 2010) (no dismissal because disclosures were not on a separate piece of paper as per HUD regulations); *McCullough v. Howard Hanna Co.*, No. 109CV2858, 2010 WL 1258112 (N.D. Ohio Mar. 26, 2010) (fact question about whether notice was provided before signing).

242. *See Wyman v. Park View Fed. Sav. Bank*, No. 09 CV 1851, 2010 WL 4868120 at 5 (N.D. Ohio Nov. 23, 2010) (forms made it clear that purchaser could choose insurer); *Capell v. Pulte Mortg.*

b. Class Certification

Because individual overcharges will be small, individual RESPA claims will rarely be sufficient to warrant a lawyer's time—even with the prospect of treble damages and attorneys' fees. Enforcement depends on certification of a class, but if a court concludes that individualized assessments of damages predominate over common issues of law and fact, the court will not certify that class.

When the purchaser contends that a violation of RESPA resulted in an overcharge, individual elements of the claim will typically predominate, preventing class certification. For instance, in *Mims v. Stewart Title Guaranty Co.*,²⁴³ purchasers alleged that the title insurer collected premiums in excess of those permitted by Texas law, and shared those excessive premiums with its title agents. Purchasers alleged that the excess premiums shared were not for services actually performed, but instead were in the nature of kickbacks in violation of RESPA.²⁴⁴ The court concluded that because the claims depended on whether the payments were reasonable in light of the services provided by the agents, class issues did not predominate.²⁴⁵

Similarly, when the claim is that the title insurer engaged in a series of separate transactions that allegedly constituted kickbacks under RESPA, class certification will be unavailable if the facts of each transaction are critical to analyzing the RESPA claim. For instance, in *Howland v. First American Title Insurance Co.*,²⁴⁶ the Seventh Circuit declined to certify a class in a suit claiming that First American disguised what were in fact prohibited referral fees paid to lawyers as statutorily permitted fees for title examination services. Purchasers alleged that when lawyers used First American as a title insurer, First American provided the lawyer with all the relevant data in its title plant, after which the lawyer would approve the search survey sheet. First American would pay the lawyer for title examination, and then issue the title insurance policy. Purchasers alleged that the payment was not for services rendered (especially when the lawyer returned the summary sheet with no changes), but was instead an improper referral fee. The court held that class certification was unavailable because

L.L.C., No. 07-1901, 2007 WL 3342389 at 7-8 (E.D. Pa. Nov. 7, 2007) (\$25,000 credit if buyer chose affiliated settlement service did not "require" buyer to use affiliated service).

243. 590 F.3d 298 (5th Cir. 2009).

244. *Id.* at 305.

245. *Id.* at 307. *See also* Benavides v. Chi. Title Ins. Co., 636 F.3d 699 (5th Cir. 2011) (individualized determinations necessary even though title company conceded that it owed money to purchasers who qualified for, but did not receive, a discounted rate).

246. 672 F.3d 525 (7th Cir. 2012).

the purchasers' claims required individualized assessment of the work the lawyer did with respect to each purchase.²⁴⁷

c. Statute of Limitations

RESPA subjects private rights of action for violation of its anti-kickback provisions to a one-year statute of limitations.²⁴⁸ Although a number of courts have recognized that equitable tolling and equitable estoppel doctrines are available to extend the statute of limitations in cases where the alleged violator has taken fraudulent steps to conceal the violation, litigation has focused on whether the violator has taken sufficient affirmative steps to trigger the tolling doctrines.²⁴⁹ Some courts have avoided the RESPA statute of limitations by finding that the unlawful kickbacks triggered liability under RICO.²⁵⁰

d. Article III Standing

Despite statutory provision for a private right of action and treble damages, recent Supreme Court jurisprudence may deprive federal courts of jurisdiction to hear most RESPA claims brought by home purchasers whose settlements were infected by prohibited practices. The problem is this: so long as title insurance premiums are fixed by state law (either because the state has promulgated rates, or because insurers are not permitted to depart from filed rates), kickbacks have no direct effect on the price consumers pay. And several recent Supreme Court cases have suggested that in similar situations, plaintiffs have no Article III standing, despite clear Congressional efforts to create a private right of action. In *Spokeo, Inc. v. Robins*,²⁵¹ the Court made it clear that "[A]rticle III standing requires a concrete injury even in the context of a statutory violation."²⁵² Most recently, in *Thole v. U.S. Bank N.A.*,²⁵³ the Court held that retirement plan beneficiaries had no Article III standing to challenge allegedly self-interested investment decisions made by the plan's sponsor and

247. *Id.* at 535.

248. 12 U.S.C. § 2614. By contrast, the statute of limitations is three years for actions brought by federal and state officials. *Id.*

249. Compare, e.g., *Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535 (4th Cir. 2019) (identifying and applying equitable tolling doctrines), with *Egerer v. Woodland Realty, Inc.*, 556 F.3d 415 (6th Cir. 2009) (concluding that violator had not taken affirmative steps to conceal alleged kickback arrangement).

250. See, e.g., *Obiefuna v. Hypotec, Inc.*, 451 F. Supp. 3d 928 (S.D. Ind. 2020).

251. 136 S. Ct. 1540 (2016).

252. *Id.* at 1549. In *Spokeo*, the Court remanded to the Ninth Circuit to determine whether a plaintiff whose personal information was inaccurately reported by a search engine, in violation of the Fair Credit Reporting Act, had alleged a concrete injury within the meaning of Article III.

253. 140 S. Ct. 1615 (2020).

administrator because the allegedly unlawful behavior would not affect the benefits the beneficiaries would ultimately receive.²⁵⁴

In *Baehr v. Creig Northrup Team, P.C.*,²⁵⁵ the Fourth Circuit concluded that Article III precluded a purchaser from challenging a kickback scheme because the purchasers could not show that they had been overcharged. Purchasers alleged that the title company paid kickbacks for referrals in violation of RESPA, but conceded that they had not been overcharged for settlement services.²⁵⁶ The court concluded that the harm alleged by purchasers—deprivation of impartial and fair competition between service providers—was not, in the absence of evidence of increased settlement costs, a concrete injury targeted by RESPA’s anti-kickback provisions.²⁵⁷ The court cast doubt on earlier cases upholding standing,²⁵⁸ noting that those cases had been decided before the Supreme Court’s decision in *Spokeo*.²⁵⁹ If other courts follow the approach taken in *Baehr*, standing will dispose of most RESPA anti-kickback claims brought by private parties.

4. RESPA’s Limited Effectiveness

As a tool for controlling the cost of title insurance, RESPA’s success has been limited. Doctrinal limits, some built into the statute and others judicially imposed, make it unattractive for private lawyers to invest resources in rooting out kickbacks and related practices. Of equal significance, disclosure obligations themselves are of little value when the parties receiving disclosure will have limited incentive or opportunity to act on the disclosure. Although RESPA’s loan estimate requirement is designed to facilitate comparison shopping, even a rational, well-informed consumer might forego that opportunity. First, in the states—a majority—where all title insurers charge virtually the same premiums for the same coverage, comparison shopping would yield no benefit. Second, even if consumers were seeking to compare a broader range of charges not regulated by state law, comparison might require multiple loan applications and multiple application fees, leading the consumer to question whether potential savings would be large enough to justify the additional fees and effort. Less discerning consumers might lack the tools to evaluate the estimate and

254. *Id.* at 1619.

255. 953 F.3d 244 (4th Cir. 2020).

256. *Id.* at 254.

257. *Id.* The court also concluded that purchasers had not suffered any real-world harm from the deprivation of fair competition. *Id.* at 256.

258. *Edwards v. First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted in part*, 564 U.S. 1018 (2011); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009); *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009).

259. *Baehr*, 953 F.3d at 255.

might treat the estimate as a list of fixed costs rather than an invitation to comparison shop.

C. RICO

In several recent cases, plaintiffs have argued that participants in the All Star kickback scheme violated RICO, a violation which would entitle a successful plaintiff to treble damages and attorney's fees.²⁶⁰ A few RICO claims have survived motions to dismiss.²⁶¹ If RICO claims ultimately succeed, they are likely to be of value only in punishing (and perhaps deterring) blatant abuses of the sort involved in the All Star scheme.

To establish civil RICO liability, a plaintiff must establish "a pattern of racketeering activity."²⁶² The statute defines racketeering activity to mean one of a laundry list of predicate offenses.²⁶³ Therefore, the absence of a predicate offense precludes a RICO claim. In the All Star cases sustaining RICO claims against motions to dismiss, the district courts have relied on mail solicitation of potential title insurance customers to establish a predicate act of racketeering activity—mail fraud.²⁶⁴ Whether other courts will follow suit—especially when the mail solicitation includes no fraudulent statements²⁶⁵—remains to be seen. Ultimately, however, the more significant limitation on RICO as a remedy for title insurance cost is that RICO will be of little value unless the challenged practice already falls afoul of another legal prohibition—like RESPA's prohibition on kickbacks.

D. Summary

To date, RICO claims, like RESPA claims, have focused largely on kickbacks. Kickbacks, however, are merely symptoms of the underlying problem: the parties who purchase title insurance are willing to pay more than the insurance is worth to them. Lenders—the primary market for title

260. 18 U.S.C. § 1964(c).

261. See *Brasko v. Howard Bank*, No. 20-cv-03489, 2021 WL 1662464 (D. Md. Apr. 27, 2021); *Ekstrom v. Congressional Bank*, No. 20-1501, 2020 WL 6565251 (D. Md. Nov. 6, 2020), *motion to certify appeal denied*, No. 20-1501, 2021 WL 119000 (D. Md. Jan. 13, 2021); *Somerville, III v. W. Town Bank & Tr.*, No. 19-0490, 2019 WL 6131288 (D. Md. Nov. 19, 2019); *but see Donaldson v. Primary Residential Mortg., Inc.*, No. 19-1175, 2020 WL 3184089 (D. Md. June 12, 2020) (dismissing RICO claim).

262. §1962(a), (b), (c).

263. §1961(1).

264. See *Brasko*, No. 20-cv-03489, 2021 WL 1662464; *Ekstrom*, No. 20-1501, 2020 WL 6565251; *Somerville, III*, No. 19-0490, 2019 WL 6131288.

265. In *Brasko*, No. 20-cv-03489, 2021 WL 1662464, the complaint did not state the contents of the mailings relied upon by plaintiffs. The court indicated that the complaint sufficiently pled a RICO violation without alleging that the fraudulent misrepresentations appeared in the mailing; it was enough, according to the court, that the mailings "facilitated the scheme by soliciting those borrowers in the first place." *Id.* at 4.

insurance—are unconcerned about cost because they can pass on 100 percent of that cost to home purchasers who have already committed to a purchase and are unlikely to blink at excessive title insurance premiums. Lenders have little reason to turn to startups who might offer lower prices, even if state regulations did not compound the problem by erecting barriers to entry for those startups. As a result, kickback prohibitions redistribute industry profits away from referral sources and towards title insurers, but do little to reduce overall costs, or to answer the basic question: is title insurance worth its cost?

V. POTENTIAL SOLUTIONS

Title insurance surely has value. That value may, or may not, exceed the cost of producing it. The preceding parts have explored why neither the market nor existing state and federal regulation has operated to align value with cost. This Part explores two potential solutions.

A. State Takeover: The Iowa Model

A state could eliminate the need for title insurance altogether by adopting a comprehensive Torrens system of title registration to displace the current recording system.²⁶⁶ Title insurance, like other insurance, is a response to risk. If the state could eliminate risk to title, the state would eliminate the need for title insurance. So far, however, the transition cost required to implement a Torrens system has proven sufficiently daunting to preclude any state from taking that course of action.²⁶⁷

More modestly, a state could eliminate excessive premiums for title insurance by banning commercial title insurance altogether, or by maintaining a state-run system that sets premiums to reflect actual claims experience. Alone among the states, Iowa has, in two separate periods, embraced each alternative. Iowa banned commercial title insurance altogether in 1947²⁶⁸ and operated with a system of abstracts and attorney opinions for nearly 40 years.²⁶⁹ As the secondary mortgage market developed, however, Iowa lenders were unable to resell their loans without

266. The case for implementing a Torrens system was made most eloquently eighty years ago in Myres S. McDougall & John W. Brabner-Smith, *Land Title Transfer: A Regression*, 48 YALE L.J. 1125 (1939).

267. See Bostick, *supra* note 12, at 110. Bostick also noted that American courts, by insisting that due process required a full-blown judicial hearing to make title registration conclusive, impeded early efforts to implement a registration system. *Id.* at 73–74.

268. IOWA CODE § 515.48(10) (2020). An Iowa lender or purchaser can obtain title insurance from an out-of-state title insurer. See 1979 Iowa Op. Att’y Gen. 523 (1979), 1979 WL 21137.

269. See generally Shannon S. Strickler, *Iowa’s Title Guaranty System: Is It Superior to Other States’ Commercial Title Insurance?*, 51 DRAKE L. REV. 385, 388–89 (2003).

providing some form of title insurance.²⁷⁰ The Iowa legislature responded by creating the Iowa Title Guaranty Program.²⁷¹ The Iowa program rests on a self-sustaining fund that provides guaranties for the payment of all adverse title claims, with surplus funds to be transferred to a housing assistance fund.²⁷² Because claims are few and far between, and because there is no need to split premiums with title agents, the premiums for the state-sponsored guaranty are substantially lower than those applicable in most other states.²⁷³ Indeed, if a lender purchases a policy, the program issues an owner's policy for up to \$750,000 at no extra charge.²⁷⁴

The low cost of the Iowa title guaranty is somewhat misleading. The Iowa Title Guaranty Division will only issue a guaranty after an abstractor has prepared an updated abstract of title and an attorney has issued a title opinion based on that abstract.²⁷⁵ The fees for the abstract and the attorney opinion are not included in the premium collected by the state. Moreover, the statute requires participating abstractors to maintain an up-to-date title plant for every county in which the abstractor operates—creating startup costs for any abstractor.²⁷⁶

In effect, these abstractors and lawyers perform the functions that local title agents play in other states, and they are compensated for their work. Not surprisingly, the Iowa Bar has been a major supporter of the status quo.²⁷⁷ So long as Iowa lenders select the lawyers who represent them, and

270. See IOWA CODE § 16.5(1)(p) (authorizing Iowa Finance Authority, through its title guaranty division to “make and issue title guaranties on Iowa real property in a form acceptable to the secondary market . . .”); see also *id.* § 16.4C (legislative finding that title guaranties “facilitate mortgage lenders’ participation in the secondary market”).

271. *Id.* § 16.91.

272. *Id.* § 16.91(1).

273. The premium for Iowa residential coverage, as of January 1, 2021, is a flat fee of \$175 for the first \$750,000, with \$1 per thousand for all amounts above that. See IOWA TITLE GUAR., POLICY UPDATE SUMMARY 2 (2020), <https://www.iowafinance.com/content/uploads/2020/06/ITG-Policy-Updates-Summary.pdf> [<https://perma.cc/3CK5-4LGJ>] (increase from \$140 to \$175, but increase in flat rate coverage from \$500,000 to \$750,000); see also *About Iowa Title Guaranty*, IOWA FIN. AUTH., <https://www.iowafinance.com/about-iowa-title-guaranty/> [<https://perma.cc/3NT5-2JJH>] (\$1.00 per thousand for coverage above the flat rate maximum). Thus, in Iowa, the premiums for a \$1,000,000 loan would be \$425, compared to \$3,530 in neighboring Illinois. See *supra* Section III.E.

274. *Owner Coverage*, IOWA FIN. AUTH., <https://www.iowafinance.com/iowa-title-guaranty/owners-coverage/> [<https://perma.cc/Y586-FTNM>].

275. IOWA CODE § 16.91(6) (2020).

276. § 16.91(5)(a)(2). The statute also requires participating abstractors and lawyers to maintain liability coverage, and gives the state subrogation rights “against all persons relating to the claim.” § 16.91(5)(a)(1). The statute does permit the Iowa Title Guaranty Division to waive the title plant requirement, and the Iowa Supreme Court has indicated that the Division acts in the public interest when it waives the requirement in order to increase competition among abstractors to drive down the price of abstracts. See *Iowa Land Title Ass’n v. Iowa Fin. Auth.*, 771 N.W.2d 399, 403–04 (Iowa 2009).

277. See *ISBA Standing Positions, Title Insurance*, IOWA STATE BAR ASS’N (Sept. 15, 2014), https://cdn.ymaws.com/www.iowabar.org/resource/resmgr/Legislative_Items/2016_Position_Paper_-_Title_.pdf [<https://perma.cc/KHS3-JR8W>] (noting that between 1994 and the date of the position paper, 927,619 title certificates were issued, with only 636 claims advanced and 64 claims paid).

pass the costs to the ultimate consumer, the potential remains for the consumer to pay more for title examination and guaranty than the services are worth.²⁷⁸ Participating lawyers have every incentive to curry favor with lenders, and to inflate fees to reflect the resulting costs.

Even opponents of the Iowa system concede that title examination and insurance costs are generally lower in Iowa than elsewhere.²⁷⁹ They focus instead on the longer time it takes to obtain an Iowa guaranty than to obtain a commercial title insurance policy—a delay that has the potential to increase loan costs to consumers.²⁸⁰ That delay results because three separate entities—abstractors, lawyers, and the guaranty department—replace the role of a title agent who might perform the function of all three entities.

Beyond the delay problem, Iowa's approach does not cure the basic structural problem—the absence of sufficient incentive to minimize title examination cost—that plagues states that rely on commercial title insurance. Iowa mitigates that problem with respect to abstractors because in Iowa it is the seller's obligation to provide the abstract on which the lawyer bases her title opinion;²⁸¹ the seller therefore has an incentive to keep abstract costs low. But, of course, the seller cannot choose and pay for the lawyer who represents the lender. Lawyers as a group may face more price competition than title insurers, but the basic problem remains: the lender who mandates the guaranty, but does not pay for the lawyer's opinion that leads to that guaranty, will be insufficiently sensitive to the fee the lawyer charges.

B. A Better Way Forward: A Lender-Pays Model

Although the Iowa system improves on the title insurance model prevalent elsewhere, it does not provide any party with incentives to compare the cost and value of title insurance. As in other states, the Iowa

278. The Iowa State Bar Association indicates that “[m]any buyers rely on the lender’s attorney’s title opinion . . .” (although the bar association, quite naturally suggests that the buyer might consider retention of a lawyer to examine the abstract for both buyer and seller). See *Buying a Home*, IOWA STATE BAR ASS’N, <https://www.iowabar.org/page/BuyingaHome> [<https://perma.cc/22RW-339G>].

279. See, e.g., NELSON R. LIPSHUTZ, REGUL. RSCH. CORP., ECONOMIC BENEFITS OF PERMITTING TITLE INSURANCE SALES IN IOWA, REPORT TO IOWA TITLE INSURANCE COALITION 6–7 (2004).

280. *Id.* at 10–12 (concluding that a higher percentage of Iowa borrowers had to obtain longer rate locks on mortgage commitments than borrowers in other states, resulting in marginally higher interest rates for borrowers with the longer rate locks). They also focus on the largely specious argument that the coverage provided by Iowa Title Guaranty is less protective of consumers than the coverage provided by title insurance. The only evidence presented to support that position is the smaller percentage of claims paid in Iowa. *Id.* at 8–10. The small amount paid out, however, could be the product of other variables, such as more careful title examination by lawyers in the Iowa process, which subjects lawyers to potential negligence liability.

281. See *Buying a Home*, *supra* note 278.

lender mandates the title guaranty, and sends the bill to the purchaser. A more attractive model would require the lender to internalize some or all of the cost of title insurance.

1. Creating Incentives

Institutional lenders are in the best position to assess the value of title insurance. As repeat players, institutional lenders have the capacity to accumulate and evaluate data about the frequency and magnitude of claims arising out of title defects. Of course, a lender may not know how many more losses would have eventuated in the absence of the title examination that precedes issuance of the title policy, but an institutional lender could experiment by acting as a self-insurer with respect to some portion of its loan portfolio, enabling the lender to compare losses with and without title insurance. So long as the lender does not bear any of the cost of title insurance, the lender has no incentive to engage in such experimentation.

In the 1990s, one enterprising institutional lender, Norwest Mortgage, did experiment with a form of self-insurance by setting up a subsidiary to conduct title examination, and then offering borrowers the option, after seeing the title report, to forgo paying for lender's title insurance if the borrower paid Norwest a fee that was 10 percent less than the price of title insurance.²⁸² Norwest then resold the mortgages on the secondary market with its own promise to repurchase the mortgage loans if title should prove defective. Title insurers, unhappy with the practice, contended that Norwest was providing title insurance without statutory authority. Although a divided Virginia Supreme Court held that Norwest's practice did not constitute title insurance,²⁸³ state supreme courts in Nebraska²⁸⁴ and South Dakota²⁸⁵ disagreed. Subsequently, a number of other state regulators informed Norwest that its practice violated state law.²⁸⁶ These cases and regulatory obstacles might well stymie any attempt by lenders to experiment with self-insurance if the lender hopes to sell its loans.

Even if the secondary mortgage market does preclude institutional lenders from dispensing with title insurance altogether, there is another, perhaps more significant, advantage in imposing title insurance costs on the lender: the lender is in the optimal position to exert downward pressure on title insurance costs. In the current environment, title insurers have no incentive to economize because their market is insensitive to price. By

282. *Laws. Title Ins. Corp. v. Norwest Corp.*, 493 S.E.2d 114, 115 (Va. 1997).

283. *Id.* at 117.

284. *Norwest Corp. v. State, Dep't of Ins.* 571 N.W.2d 628 (Neb. 1997).

285. *State, Div. of Ins. v. Norwest Corp.*, 581 N.W.2d 158 (S.D. 1998).

286. *See generally* PALOMAR, *supra* note 36, § 1.6.

contrast, if lenders were forced to bear the cost of title insurance, they would be more likely to force price competition in states that currently allow markets to operate. In filed-rate states, lenders would have both incentive and opportunity to raise objections to rates based on inflated or unnecessary costs—objections no one has incentive to raise under the current structure. Perhaps most important over the long term, lenders would have an incentive to lobby for changes in state law that would eliminate barriers to entry into the title insurance industry. In particular, they might press for elimination of requirements that insurers maintain title plants and conduct title searches. Changes like those would pave the way for startups to shake up the industry.

2. Mechanics

The most effective way to ensure that lenders internalize the cost of title insurance is to require that they roll those costs into the loan interest rate or loan origination fee (often referred to colloquially as “points”), rather than treating them as a separate item on a settlement statement. Of course, borrowers will bear the cost of any marginal increase in interest rates the lender might charge to offset the cost of title insurance. Nevertheless, requiring the lender to build title insurance into the interest rate and into the annual percentage rate (APR) is likely to generate lender incentives that do not currently exist.²⁸⁷ When borrowers shop for mortgage loans, interest rates and the monthly payments derived from those rates are the numbers borrowers are most likely to compare.²⁸⁸ As a result, lenders have reason to keep those numbers as low as possible to compete in the market for loans.

Consider, as an example, a New York mortgage loan for \$500,000. The premium for an owner’s policy on that amount is \$2,391, and the additional premium for a loan policy on the same amount is 30 percent of that amount, or \$717.²⁸⁹ The total premium would be \$3,108. Although the mortgage loan might be for 15 or 30 years, the average duration of a mortgage loan is much shorter, because the owner is likely to sell or refinance long before the maturity of the mortgage. Assuming an average duration of five years

287. See generally Yoon-Ho Alex Lee & K. Jeremy Ko, *Consumer Mistakes in the Mortgage Market: Choosing Unwisely Versus Not Switching Wisely*, 14 U. PA. J. BUS. L. 417, 453 (2012) (advocating for a government-certified product-comparison methodology that would make it easier for consumers to compare loan costs).

288. See Alan Schwartz, *Regulating for Rationality*, 67 STAN. L. REV. 1373, 1375–76 (2015). Schwartz noted that the premise of the Truth in Lending Act was that consumers would act to minimize interest unless it proved too costly to acquire information. He argued that the premise that consumers will act rationally is plausible when the consumer has only to compare the numbers firms quote.

289. See *supra* Section II.C.2.

for the loan,²⁹⁰ the lender would have to increase monthly payments by more than \$50 per month in order to recover its outlay for title insurance. That would amount to more than 1/8 of one percent in interest rate or APR—a difference that could well be significant to rate-conscious consumers, and that should induce the lender to take steps to reduce its cost to compete more effectively.

By contrast, under the current RESPA/TILA regime, anticipated title insurance costs are listed on the loan estimate form as a subheading entitled “Services You Can Shop For” in a list of “Closing Cost Details.”²⁹¹ That subheading signals to the buyer that these costs will not be borne by the lender and the borrower should therefore exclude them from any comparison shopping the borrower might do among competing lenders. Of course, because title insurance is a one-shot purchase for the borrower, most borrowers will not find investigation of title insurance premiums worthwhile.

Moreover, to calibrate lender incentives properly, lenders should be required to incorporate all title costs—including title search and title examination costs as well as title insurance costs—into the interest rate and points. Otherwise, lenders and insurers might arrange to separate these costs and impose all but the cost of insurance on the borrower, enabling the lender to avoid including in APR the vast bulk of costs built into title insurance. In addition, in any case where the lender procures lender’s insurance, the lender should be required to add owner’s insurance for the balance of the loan term. Even under a “lender-pays” system, the buyer will ultimately bear most of the cost of title insurance in the form of higher interest. Since the buyer is paying for protection, the buyer should obtain protection which costs so little for the insurer to provide. As already noted, once the insurer has done the work necessary to support issuance of a title policy, the insurer faces almost no additional work, and little additional risk, in insuring the borrower’s interest.²⁹² In those circumstances, the lender should be able to use its leverage to ensure that the insurer prices owner’s insurance at or close to the cost of producing it.

To summarize, a lender-pays model generates two related benefits. First, it creates a one-stop shopping model for buyers who would be able to focus

290. The average duration of a mortgage varies substantially with changes in interest rate and the relative attractiveness of refinancing. One data sample found an average duration of 4.5 years. See Aytek Malkhozov, Philippe Mueller, Andrea Vedolin & Gyuri Venter, *Mortgage Risk and the Yield Curve*, 29 REV. FIN. STUD. 1220 (2016).

291. See CONSUMER FIN. PROT. BUREAU, TILA RESPA INTEGRATED DISCLOSURE: H-24(B) MORTGAGE LOAN TRANSACTION LOAN ESTIMATE—FIXED RATE LOAN SAMPLE 2, https://files.consumerfinance.gov/f/201403_cfpb_loan-estimate_fixed-rate-loan-sample-H24B.pdf [<https://perma.cc/3VDH-NYNP>].

292. See *supra* Section I.D.

attention on the overall cost of a mortgage rather than separately investigating the cost of title insurance, which might seem insignificant within the context of a major property purchase. Second, because buyers would be focused on overall cost, a lender-pays model would transform the role of the institutional lender from indifferent observer to zealous monitor of title insurance pricing.

A lender-pays system of this sort is not an entirely new idea. In the 1970s, at the time RESPA was enacted, Senator William Proxmire promoted a lender pay system.²⁹³ Opposition from the title industry scuttled the idea, and Congress opted instead for RESPA's disclosure regime. The attraction of disclosure regimes has faded over the last half century, and the experience with RESPA accentuates the impotence of a regime that provides too much disclosure.²⁹⁴ And even if RESPA's disclosure regime had proven effective to inform prospective buyers, no individual buyer would find it worthwhile to act on the title insurance disclosures RESPA mandates. At this point, a lender pay regime appears the superior alternative. If cheaper title insurance would enable lenders to advertise lower mortgage rates, lenders would have reason to embrace startups who would exert price pressure on established title insurers.

3. Exclusions

The focus of lender-pays regimes should be on the property typically purchased by housing consumers: the one- to four-family residential properties currently covered by RESPA and TILA. Lenders and purchasers of commercial properties and larger-scale residential properties are more capable of allocating the cost of title insurance through individual negotiation. Moreover, a lender-pays regime for one- to four-family residences would be likely to restructure the title insurance market in ways that would benefit purchasers not covered by the scheme.

A lender-pays regime would also generate no immediate benefit for the not-insignificant percentage of home buyers who purchase without the benefit of a mortgage loan.²⁹⁵ But that group would suffer no harm if a lender-pays model was adopted for bank-financed purchases. Perhaps more

293. See Charles G. Field, *RESPA in a Nutshell*, 11 REAL PROP., PROB. & TR. J. 447, 448 (1976).

294. See Jason Scott Johnston, *Do Product Bans Help Consumers? Questioning the Economic Foundation of Dodd-Frank Mortgage Regulation*, 23 GEO. MASON L. REV. 617, 694 (2016) (observing that the mortgage consumer is "inundated by so many disclosure forms that even ideal disclosures would cause overload and confusion").

295. The National Association of Realtors estimates that 86 percent of all buyers finance their home purchases. NAT'L ASS'N OF REALTORS RSCH. GRP., 2020 HOME BUYER AND SELLERS GENERATIONAL TRENDS REPORT 84 (2020), <https://www.nar.realtor/sites/default/files/documents/2020-generational-trends-report-03-05-2020.pdf> [https://perma.cc/X6L3-HP2D].

important, those buyers would ultimately benefit from the restructuring of the title industry that would almost certainly result from adoption of a lender-pays regime.

CONCLUSION

Within the current American system of relative title to land, title insurance surely has value. From the perspective of home purchasers, title insurance provides peace of mind. From the perspective of lenders, title insurance increases the marketability of loans on the secondary mortgage market. On top of that, the title insurance industry has played an important role in clearing title on many properties.

The problem, however, is that neither market forces nor existing government regulation has been effective at ensuring that the price of title insurance reflects the cost of producing it or the value of obtaining it. Startups are ready to test title insurance models that might reduce cost, but none of the players in the current system has sufficient incentive to ensure that title insurance is produced as efficiently as possible or sold at prices that reflect the cost of efficient production.

One solution would be to entirely revamp the American system of land title to make title insurance unnecessary. A more modest, less costly, and more feasible approach would enlist the market to discipline title insurance pricing by requiring institutional lenders, the parties in the best position to exert pressure on price, to bear a larger share of the cost of title insurance.