




SafetyDeed

TECHNICAL DISCUSSION





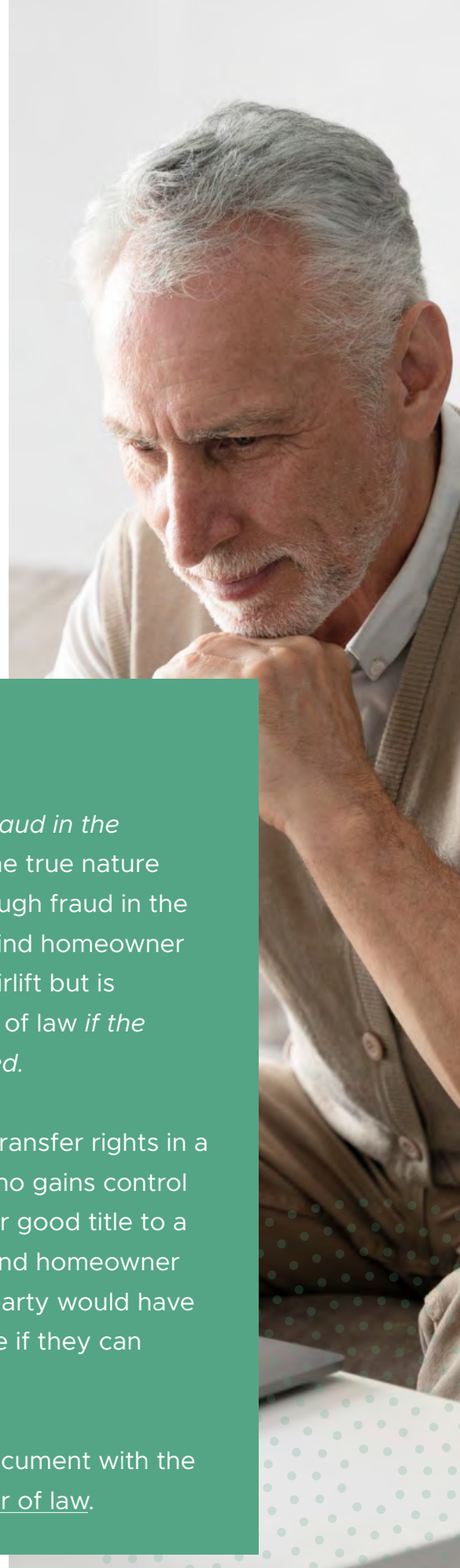
SafetyDeed provides strong protection against harm caused by fraud and by poor decision making caused by inexperience or cognitive decline. These protections take the form of legal engineering, cryptographic methods, and evidentiary resources that make SafetyDeed a senior unsecured lienholder, clouds title, and shifts the burden of proof onto bad actors and their transferees.

*This document is not intended to modify or supplement any provision in any agreement between you and SafetyDeed. If you apply to become a SafetyDeed client, you will be provided with a contract to review and discuss with your lawyer.*



# Understanding Fraud

Defrauded homeowners usually contest title transactions by alleging fraud in the inducement, duress, undue influence, unilateral mistake, unconscionability, incapacity, forgery, or fraud in the execution. These claims can be difficult and expensive to prove, especially when the victims' memory, hearing, vision, judgment, awareness, or independence are in question or when they no longer have capacity or have died. Furthermore, only the last two claims provide a basis for invalidating agreements as a matter of law.



## Fraud in the Execution and Forgery

*Fraud in the execution (also called fraud in the factum or fraud in the inception) occurs when one party uses deception to hide the true nature of a contract from the other party. Contracts executed through fraud in the execution are invalid as a matter of law. For example, if a blind homeowner were to sign what they are told is a contract to install a chairlift but is actually a gift deed, the contract would be void as a matter of law if the homeowner can prove they did not intend to sign a gift deed.*

Under the rule of derivative title, a property owner cannot transfer rights in a property greater than their own. This means that a party who gains control of a property through fraud in the execution cannot transfer good title to a third party. For example, if the bad actor who duped the blind homeowner were to sell the house to an innocent third party, the third party would have no defenses against the victim's claim to recover their home if they can prove fraud in the execution.

Forgery occurs when a bad actor creates a false written document with the intent to defraud. Forged deeds are always void as a matter of law.

## Fraud in the Inducement

A far more common and pernicious form of fraud is *fraud in the inducement*. This occurs when one party misrepresents facts to induce the other party to enter into an agreement. For example, a buyer might convince a homeowner to sign a contract for sale by claiming, falsely, that the IRS will otherwise foreclose upon their home. Contracts signed through fraudulent inducement are valid as a matter of law. The factors the victim relied upon in deciding to sign the agreement do not matter. The only question considered by the courts under initial review is whether the party seeking to void the contract knew what they were signing.



More importantly, although a victim of fraudulent inducement might be able to recover against a bad actor under theories of undue influence, incapacity, unilateral mistake, or unconscionability, they cannot recover against a third party who purchases their property from a bad actor in good faith.

For example, if the bad actor in the IRS foreclosure scam were to sell the home to a third party, the victim's only valid claim would be against the bad actor and not against the third party *unless they can prove the third party knew or should have known about the underlying fraud*. In the absence of such proof, the law considers the third party to be a bona fide purchaser (sometimes called a *bona fide purchaser for value*).

A bona fide purchaser is a party who purchases a property without actual or constructive notice of another party's competing claim. The courts will honor a sale to a bona fide purchaser and allow the defrauded original owner to seek remedy only from the bad actor.

The outcome would be similar in the case of the sale of a fraudulently obtained promissory note to a third party. Under the *holder in due* course rule, if a bad actor obtains a promissory note, such as a mortgage, through fraudulent inducement and sells it to a third party, it will be valid and enforceable in the hands of the third party if “the instrument ... does not bear ... apparent evidence of forgery or alteration ... and the holder took the instrument in good faith, *without notice that the instrument contains an unauthorized signature or has been altered.*” (UCC § 3-302(a) (emphasis added))



# How SafetyDeed Overcomes Good Faith Defenses

SafetyDeed and a homeowner enter into an entrustment protection contract—a SHERPA (Senior Homeowner Equity and Realty Protection Advisor) Agreement—in which the homeowner pays SafetyDeed to certify that certain conditions precedent that future agreements affecting its title must comply with have been met.

The contract creates in SafetyDeed a personal interest that it records in the form of a protective covenant. This makes SafetyDeed a senior lienholder with respect to future interest holders and gives constructive notice that the conditions precedent outlined in the entrustment protection contract must be satisfied before any interests in the property may be created in any third party or extinguished. This type of covenant is sometimes referred to as a “negative easement.”\*

Homeowner stipulates that the only evidence that the protective conditions have been satisfied with respect to any particular transaction is a Certificate of Compliance, i.e., an estoppel certificate, that bears SafetyDeed’s cryptographic signature. The covenant recites this requirement.

By its nature, a cryptographic signature must be authenticated before it may be relied upon. It is impossible to authenticate one visually. Because it is virtually impossible to forge a cryptographic signature, no one who relies upon a forged cryptographic signature can claim to be a bona fide purchaser or holder in due course. Due to this security feature, there is no legal barrier to a homeowner recovering their home or to repudiating a mortgage that was fraudulently obtained even if it has been sold to a third party.

\* See 232 P.3d 390, 395 (2010) “A ‘negative easement’ ... preclude[s] the owner of the land subject to the easement from doing that which, if no easement existed, he would be entitled to do.” 618 P.2d 1216, 1220 (1980) “A negative easement can be created by a grant or agreement ... and is binding upon purchasers of the servient tenement who have actual or constructive notice of it.” See also, 338 U.S. 621, 627 (1950) “A contractual restriction which limits the use one may make of his own lands in favor of another ... is sometimes called a negative easement, which is the right in the owner of the dominant tenement to restrict the owner of the servient tenement in the exercise of general and natural rights of property. It is an interest in lands ... and is in every legal sense an incumbrance.”



## Nature of the Covenant

A SHERPA Covenant is personal to SafetyDeed and its client and does not run with the land. The next owner of the property will not be affected by it if it acquired its interest through a certified transaction.

## Standing

If a party were to claim or obtain an interest in a client's property without satisfying the terms of the SHERPA Agreement, then SafetyDeed would have a cause of action against that party that was independent of any claim the client might have. Thus, SafetyDeed could pursue a claim against a bad actor even if the client was no longer alive or simply did not want to pursue legal remedies. This is important because scammers and abusers often know their victims well and count on their not fighting back. Although SafetyDeed is not obligated to pursue remedies on its own or a client's behalf, even if a bad actor is willing to gamble that the client won't fight back, it will have to consider carefully whether SafetyDeed will.





# SafetyDeed versus Irrevocable Trusts

A trust is created when one person (a trustee) holds legal title to property for the benefit of another (a beneficiary). Putting a home into an irrevocable trust managed by a professional trustee is one of the most effective ways property owners can protect themselves against fraud. By contrast, revocable trusts usually provide little or no protection because the homeowner is usually their own trustee.

The trust approach has several benefits and several disadvantages.

The main benefit to using an irrevocable trust is that when there is a competent third-party trustee, due diligence occurs regardless of the beneficiary's sophistication, health, or mental state.

The core disadvantage is that it requires the homeowner to relinquish legal title to their property. If they want to sell, mortgage or give away their home, they must first seek their trustee's permission. Many property owners are reluctant to put themselves in this position.

Another disadvantage is expense. A senior who lacks a friend or relative capable, willing, and trustworthy enough to be their trustee must hire a professional. Tax planning, compliance, audit, legal, and other overhead also add costs.

Finally, because a trustee holds legal title to a property and is accountable only to the beneficiary, any malfeasance or misfeasance on the trustee's part would be hard to detect if the beneficiary were to experience a decline in capacity, become isolated, or die. When the trustee is a lawyer, attorney-client privilege compounds the danger by shielding the malfeasance from discovery.

If a SafetyDeed client wants to put their home into an irrevocable trust, the decision should be discussed with its attorney and financial advisor. If the client decides to proceed, the conveyance would be treated as a transaction covered by the SHERPA Agreement. The client's Reviewers (if any) would be notified, and SafetyDeed would require the client to retain an attorney to write an opinion letter regarding the legitimacy of the arrangement. SafetyDeed would retain its power of attorney in order to examine the trust agreement and the eventual disposition of the home.

## Effect of SafetyDeed on Marketability of Title and Mortgages

The cryptographic signature on a Certificate of Compliance is generated using a private key in a public key infrastructure. This means that once issued, a certificate cannot be disavowed. This protects future legitimate interest holders.

It is possible that a prospective buyer or lender might decline to purchase or lend against a property protected by a SHERPA Covenant.

SafetyDeed believes that the disclosure and documentation requirements set forth in the SHERPA Agreement and Covenant are similar to those that any prudent attorney would insist upon for an older client. Furthermore, legitimate lenders already comply with the basic requirements when they comply with the Truth in Lending Act (Reg. Z) and other federal and state disclosure laws.

In SafetyDeed's opinion, a homeowner should not do business with anyone who would walk away from a deal simply because they said they wanted to discuss it with their lawyer or family first.



# Unavailability of SafetyDeed

SafetyDeed is a new company with a novel approach to title protection. If it or its successors are no longer in existence when a client decides to sell, mortgage, or modify its title, the client will have to be represented by a lawyer in the transaction. Other protective conditions spelled out in the covenant will also apply.



## SafetyDeed's Power of Attorney

Bad actors fear discovery. That is why a SHERPA Agreement includes a durable, irrevocable, limited power of attorney that gives SafetyDeed the ability to seek and obtain documents affecting a client's property, including those that attorney-client privilege might otherwise shield.

"Durable" means the power of attorney remains in effect even if the homeowner suffers a mental or physical decline that makes it impossible for them to care for themselves or make decisions. "Irrevocable" means it cannot be revoked or canceled. "Limited" means it only gives SafetyDeed specific powers.

The power of attorney explicitly prohibits SafetyDeed from signing any agreements on a client's behalf or accessing any of their accounts or instructing their attorneys or advisors, or exercising any control over them, their property, or their estate.

The power of attorney—and similar contractual rights created by the SHERPA Agreement that give SafetyDeed the ability to obtain information after a client dies—are disclosed in the recorded SHERPA Covenant, which is a public document. That way, attorneys, family members, heirs, guardians, executors, and the courts all know the scope of SafetyDeed's authority.

## Fees

SafetyDeed charges the same fee no matter how much a home is worth. There is no application fee.

Fees for Processing, Attorney Review, and Additional Services currently are calculated at 75% of the Paralegal Rate published by the United States Attorney's Office for the District of Columbia (the Fitzpatrick Matrix) for the year the SHERPA Agreement is signed. After the five-year anniversary of the Agreement, fees are adjusted for inflation at 3% per annum from the date of the Agreement.

## Protections Against External Threats

To guard against external threats, SafetyDeed uses the same cybersecurity techniques that financial institutions employ, one of which is using cryptographic signatures to sign and encrypt critical records and documents. Copies of critical documents are kept in an encrypted federated database (a blockchain) that can be accessed by authorized persons but cannot be altered by SafetyDeed.

# Protections Against SafetyDeed

SafetyDeed was designed by lawyers and cybersecurity experts in line with “Zero Trust” principles. That means that no person or entity is presumed to be trustworthy—not even SafetyDeed.

The following elements of the SHERPA Agreement reflect that presumption.



## General Prohibitions

Neither SafetyDeed nor any of its officers, employees, agents, contractors, successors, or assigns may ever serve as an attorney, financial advisor, real estate agent, broker, mortgage broker, guardian ad litem, conservator, executor, or trustee for any client or its trust or be a beneficiary of its estate.

These prohibitions are recited in both the SHERPA Agreement and the SHERPA Covenant so there is a public record of them. The parties stipulate that they cannot be waived or rescinded and will survive termination of the Agreement.

## Fiduciary Role of SafetyDeed

SafetyDeed stipulates in the SHERPA Agreement that it bears a fiduciary duty to its clients. “Fiduciary” is a very important legal term that imposes upon SafetyDeed the highest duty of care and loyalty towards its clients. As such, SafetyDeed does not employ any legal strategies to put its clients at a disadvantage if a dispute arises.



## No Unilateral Changes to the Agreement

No provision in the SHERPA Agreement permits SafetyDeed to modify any part of it without the homeowner's consent. Fee increases are prohibited during the first five years of the Agreement, with subsequent increases limited to three percent per annum.

## No Arbitration Clause

There is no arbitration clause in the SHERPA Agreement, which means SafetyDeed can be sued in a court of law.

## No Class Action Waiver Clause

There is no class action waiver clause to prevent clients from joining class-action lawsuits against SafetyDeed.



## No Onerous Venue or Forum Selection Clause

SafetyDeed designates one venue in each state in which it does business as the venue in which it may be sued in a court of law and stipulates as such in the SHERPA Agreement. In this way, clients are not forced to leave their state if they want to sue SafetyDeed. (SafetyDeed.com's Terms of Use includes a more restrictive venue and forum selection clause for non-parties to the SHERPA Agreement, such as Reviewers and counterparties.)

## Limited Liability

The SHERPA Agreement limits SafetyDeed's liability except for gross negligence and willful misconduct. It also contains protections similar to those in the SeniorSafe Act that protects SafetyDeed from liability for reporting the suspected abuse of a client to any person or authority. Clients also agree to indemnify and defend SafetyDeed against suits brought by third parties, including Reviewers and counterparties.

READ THE SHERPA AGREEMENT TO FULLY UNDERSTAND THE PARTIES' LIABILITIES AND OBLIGATIONS UNDER THE AGREEMENT.

## No Attorney-Client Privilege

Although documents in its possession are held in strict confidence, SafetyDeed stipulates in the SHERPA Agreement that they are not protected by attorney-client privilege.



## Conclusion

Fraud, abuse, and aging are complex and evolving human problems that cannot be completely addressed by static legal documents or technological solutions. SafetyDeed welcomes comments and suggestions that are freely given.