



PRIVATE TRANSFER FEES

PROVEN TO FAIL?

A White Paper Update

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The opinions expressed in this White Paper Report are those of the authors and do not necessarily reflect the opinions or policy of the NATIONAL ASSOCIATION OF REALTORS®, its members, or affiliate organizations.

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About the Author

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- *Recovering Online Legal Research Costs*
- *Private Transfer Fees—Potential for Trouble, Problems for the Future?*
- *Government Responses to Climate Change—A Look at State and Local Actions Affecting the Real Estate Industry*
- *Maintaining Properties in Foreclosure—How Communities Across America are Responding to the Vacant Property Crisis in Their Own Backyards*
- *Water Rights—A White Paper Report*
- *Building Codes: Origins and Implementation*
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- *State and Local Taxation—A White Paper Report*
- *Land Banks—Investing in Communities, Banking on Revitalization*
- *Sales Tax on Services—A White Paper Report*

Preface

Private Transfer Fees (PTFs) are a relatively new way to collect fees from a real estate transaction. A PTF allows a third party to collect a small fee upon every purchase of a particular property, calculated as a percentage of the sale price, far into the future. Developers and others started using PTFs in earnest about a decade ago, leaving state legislatures to catch up.

PTFs have rightly become a concern for REALTORS[®], because they may require disclosure to buyers and create last-minute closing complications. This problem may be alleviated, however, by clear regulatory requirements and further self-education by REALTORS[®]. Even with such steps, continued close attention to the issue is necessary. Since the original publication of this White Paper, new rules have been implemented to limit the effect of PTFs—or to ban them entirely. Despite these changes, questions about the legal enforceability of PTFs are almost certain to arise from purchasers, and agents and brokers should be prepared.

To date, state legislatures seem willing to tolerate some PTF flavors, but not others. Less popular PTFs are those designed to benefit a real estate developer, its broker, and the company marketing the PTF business methodology. Those intended to provide funding for conservation efforts or community-oriented facilities have fared better, as have purely charitable fees that benefit a public interest like disaster relief.

In the wake of state regulation, PTF advocates' ultimate success may largely depend on how they are able to characterize the device in the eyes of the law—is it simply a hamburger patty, or perhaps prime rib? Even without state bans, legal

challenges may be raised. Given the relatively small amount of the PTF in each transaction, individual legal claims may not be too large, but do not underestimate the plaintiff bar's ability to assemble a class or motivate the residents of a wealthy resort community to take action against a PTF.

Once challenged for legal enforceability, PTF advocates will have to make a case that the PTF is either a new "future interest" or an enforceable "servitude." Each implicated doctrine of the law is steeped in strict and archaic requirements that date back to feudal England. At least some, and perhaps much, state court litigation may be necessary before the PTF trend is established or broken. In the end, only those PTFs that are used to directly benefit the current property owner or the environment are likely to survive. During the period of uncertainty, real estate purchasers will need information about this relatively new, complicated, and controversial concept.



I. Private Transfer Fees—History and Status

Private transfer fees (PTFs), also sometimes referred to as *private transfer taxes*, are a newer issue in real estate law and practice. When this paper was originally issued in 2008, the concept had created quite a stir, with little middle ground. Since 2008, state legislatures and federal regulators have restricted PTFs, with over 40 states now banning PTFs in at least some situations. Despite these efforts, PTFs still exist. But just what are PTFs? How do they work, and how do they affect day-to-day real estate transactions? What is their potential impact on the future of real estate law and practice? The following discussion will attempt to answer these questions and more.

A. What are PTFs?

Where allowed, a PTF generally attaches to newly constructed property, often in a common-interest subdivision.¹ In a common PTF scenario, a builder adds a covenant to the deed to each new home that it sells, which attaches to *that* sale and all *future* sales of the property as well, often for as long as 99 years.² The covenant requires future buyers of the property, for as long as the covenant remains in effect, to pay a certain percentage of the sale price as a “transfer fee.”³

¹ See *Private Transfer Fees* (National Association of REALTORS®), available at <http://www.realtor.org/topics/private-transfer-fees>.

² Marjorie Ramseyer Bardwell & James Geoffrey Durham, *Transfer Fee Rights—Is the Lure of Sharing in Future Appreciation a Flawed Concept?*, (American Bar Association May/June 2007), at 25, available for download at <http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=219184>.

³ See Kelly Quigley, *A New Buyer's Burden—An Emerging Type of Transfer Fee Can Add Thousands of Dollars to Closing Costs*, REALTOR (Sept. 2007), available at <http://realtomag.realtor.org/news-and-commentary/feature/article/2007/09/private-transfer-taxes-new-buyers-burden>.

Transfer fees are typically either a small percentage of the sale price or a flat fee, and may be billed as a “capital recovery fee.”⁴ Sometimes, the money from the fees is divided up among the original covenantor (the original seller), a private company that licensed the particular PTF mechanism being used as a “business method” (also called the “licensor”), and the real estate broker (who, in these types of transactions, traditionally represents the seller).⁵ In some cases, the PTFs are marketed as a kind of private, money-making investment vehicle. In other cases, the money from the fees is earmarked for a particular public or beneficial purpose, and may not be shared among the various parties except as required to pay the expenses of administration. Still other PTFs involve a hybrid of these systems.

The original (first) buyer of the property subject to a PTF may have the right to “opt out” of the PTF covenant, or he or she may be automatically exempt from the PTF pursuant to the terms of the covenant.⁶ Such an initial exemption, while seemingly appealing, may actually serve to “camouflage” the PTF, so that the original buyer is caught off guard by the existence of the covenant when he or she attempts to sell the property.⁷ The original buyer also has a unique opportunity to object to the covenant in her deed before it restricts the land, which may pass without notice. Some PTF covenants may include an option to resell the property back to the original covenantor (seller) for ninety percent of its value. If the covenantor chooses not to buy back the

⁴ See Michele Lerner, *Buyers Beware of Private Transfer Fees* (Jan. 15, 2015), available at <http://www.realtor.com/advice/buyers-beware-private-transfer-fees/>.

⁵ Ramseyer Bardwell & Durham, *supra* n.2, at 25.

⁶ *Id.* at 26.

⁷ *Id.*

property, the seller is free to sell it to someone else free and clear of the covenant, which then ceases to exist.⁸

PTFs are easy to obscure in a larger transaction. Builders' representatives may tell buyers that the fees are one-time community-benefit fees, a Placer County, California representative said,⁹ but often that is not actually the case. Some buyers may think the fee is a tax of some sort. Technically, PTFs are not a tax, because they are imposed by private parties and not the government. Yet references to (and thus perhaps perceptions of) PTFs as private transfer *taxes* are common, and other issues, both practical and legal, swirl around PTFs as well.



B. The First PTF Laws—California and Texas

In 2008, PTFs were most commonly found in California, but were beginning to crop up in other states as well.¹⁰ At that time, California was just one of two states—the other being Texas—that had enacted legislation explicitly addressing private transfer

⁸ *Id.* at 28.

⁹ Name Withheld, Contract Government Affairs Representative, Telephone Interview (Mar. 14, 2008).

¹⁰ Quigley, *supra* n.3, *A New Buyer's Burden—An Emerging Type of Transfer Fee Can Add Thousands of Dollars to Closing Costs*, available at <http://realtormag.realtor.org/news-and-commentary/feature/article/2007/09/private-transfer-taxes-new-buyers-burden>.

fees in general real estate transactions. Both of these states passed the laws during their 2007 legislative sessions.

California's law—the only one of its kind at that point—focused on the disclosures that must be made relative to PTFs (see sidebar).¹¹ It required substantial detail in a fee disclosure to the buyer. In 2008, forty-seven jurisdictions had *general* provisions that might have required a real-estate licensee to disclose private transfer fees to a potential buyer, but the California law contained the most specific, PTF-related disclosure and recording requirements.

The California recording requirements included the following:

For transfer fees imposed **before January 1, 2008**, the fee's receiver, as a condition of the payment of the fee on or after January 1, 2009, must record in the office of the county recorder on or before December 31, 2008, a separate document entitled "Payment of Transfer Fee Required." The title must be in at least fourteen-point boldface type, and the document must include:

- the names of all current owners of the real property subject to the transfer fee;
- the affected property's legal description and assessor's parcel number;
- the amount (if a flat fee) or the percentage of the sales price that constitutes the fee;
- if the real property is residential property, "dollar-cost examples" of the fee for a home priced at \$250,000, \$500,000, and \$750,000;
- the date or circumstances, if any, under which the transfer fee payment requirement expires;
- the purpose for which the funds will be used;
- the entity to which the funds will be paid;
- specific contact information regarding where the funds must be sent; and
- the signature of the authorized representative of the entity to which the fees will be paid.

If a transfer fee is imposed on real property **on or after January 1, 2008**, the person or entity imposing the fee, as a condition of payment of the fee, must record in the office of the county recorder, concurrently with the instrument creating the transfer fee requirement, a separate document entitled "Payment of Transfer Fee Required." The document's title must be in at least fourteen-point boldface type, and the document must include all of the information listed above.

See [Cal. Civ. Code § 1098.5 \(2007, 2014\)](#).

¹¹ See [Cal. Civ. Code §§ 1102.2, .3, .6e, .7, .10 \(2007\)](#).

The California statute generally permitted transfer fees that were imposed by a deed, contract, security instrument, or other transfer document.¹² The Texas law, by contrast, did *not* permit PTFs, except under certain specified situations, such as when the fees were paid to the property owners' association that managed or regulated a subdivision, or to a charitable organization or governmental entity.¹³ According to Craig Chick, then Political Affairs Director for the [Texas Association of REALTORS®](#), the law, which went into effect on January 1, 2008, prohibited the type of transfer fees that are pitched as an investment vehicle by private companies.¹⁴

California's current statute still allows private transfer fees, and the separate document entitled "Private Transfer Fee Required" must be recorded concurrently with the instrument creating the transfer fee obligation.¹⁵ Under current Texas law, by contrast, a private transfer fee obligation created on or after June 17, 2011, is void and not binding or enforceable against a subsequent owner or purchaser of a real property interest; however, a transfer fee obligation created *before* June 17, 2011, is valid if the receiver of the fee filed a "Notice of Private Transfer Fee Obligation" on or before January 31, 2012.¹⁶

¹² See [Cal. Civ. Code § 1098 \(2007, 2014\)](#).

¹³ See [Tex. Prop. Code Ann. § 5.017 \(2007, 2014\)](#); see also [H.B. 2207, § 2, 80\(R\) Leg., Reg. Sess. \(2007\)](#).

¹⁴ Craig Chick, Former Political Affairs Director, Texas Association of REALTORS®, Telephone Interview (Mar. 19, 2008).

¹⁵ [Cal. Civ. Code §§ 1098, 1098.5 \(2014\)](#).

¹⁶ [Tex. Prop. Code §§ 5.202, .203 \(2014\)](#).

C. The Legislative and Regulatory Response

California and Texas were the front-runners in what turned out to be a national legislative movement, primarily *against* PTFs. While the 2008 edition of this White Paper noted legislative activity in Arizona, Colorado, Florida, Nevada, and Virginia, many more states have taken a stand since that time. And not all activity was at the state level. In early 2012, the Federal Housing Finance Agency (FHFA) sent to the Federal Register a final rule that limited Fannie Mae, Freddie Mac, and the Federal Home Loan Banks from dealing in mortgages on properties encumbered by PTFs under certain conditions.¹⁷ The final rule does not apply to private transfer fees paid to homeowner associations, condominiums, cooperatives, and some tax-exempt organizations that use the PTF proceeds to benefit the property. If the private transfer fees are not so used, however, the mortgages on the subject property may not be sold to Fannie Mae or Freddie Mac, or used as collateral for Federal Home Loan Bank advances. The rule applies only to private transfer fee covenants created on or after the date of initial publication of the proposed rule, February 8, 2011.



Many interested parties, including the National Association of REALTORS®, would like to take the federal regulatory action a step further. On April 23, 2014, NAR® signed onto a coalition letter (see sidebar) urging the Federal Housing Administration

¹⁷ See Federal Register, *Private Transfer Fees* (Mar. 16, 2012), available at <https://www.federalregister.gov/articles/2012/03/16/2012-6414/private-transfer-fees>.

(FHA) to harmonize its treatment of PTFs with that of the FHFA, establishing a clear, national standard to protect homeowners from equity-stripping private transfer fees, while preserving the sovereignty of state and local governments over land use standards.¹⁸

The Honorable Carol Galante Assistant Secretary for Housing – Federal Housing

Dear Commissioner Galante:

We understand that the Federal Housing Administration (FHA) may issue a proposed rule on transfer fee covenants that will apply to FHA-insured mortgages. Previously, we have urged FHA to harmonize its regulatory treatment of transfer fee covenants with the Federal Housing Finance Agency (FHFA). We continue to believe that FHFA's final rule on transfer fee covenants establishes a clear, national standard to protect homeowners from equity-stripping private transfer fees while preserving the preeminence of State and local governments over land use standards. FHA should accept a mortgagee's compliance with FHFA's transfer fee covenant regulation as compliance with relevant FHA mortgage insurance program rules, guidelines and requirements. Any additional and potentially conflicting federal standard on transfer fee covenants by FHA will cause confusion in the housing market and require community associations to amend governing documents. Amendments to community association covenants, conditions, and restrictions can be difficult to execute and by statute generally require legal counsel and the approval of at least a supermajority of owners.

The majority of existing State statutes permit transfer fee covenants where proceeds are delivered to a community association or nonprofit and provide a direct benefit to the property. These covenants can increase the value of the homeowners' property by ensuring adequate reserve funds and covering the cost of desirable services and amenities. By contrast, states and FHFA have rejected the purely equity stripping private transfer fee covenants where proceeds are delivered to a third party with no continuing interest in the burdened property.

Fees that increase the costs of housing can disenfranchise those who wish to obtain the American dream; however, fees that provide a direct benefit to homeowners and improve the property are legitimate and should be permitted. Prohibiting purchases in communities with these types of fees will greatly disadvantage the millions of homeowners living in community associations, making it much harder for them to sell their homes. FHFA gave thoughtful consideration to this issue, reviewing more than 4,000 comments. We urge you to mirror FHFA's rule, and prohibit only those fees that don't benefit the homeowner and association where they live.

Thank you for your time and consideration of this matter. If you have any questions or concerns, please do not hesitate to contact us.

Sincerely,

*American Land Title Association
Community Associations Institute
Institute of Real Estate Management
Mortgage Bankers Association
National Association of Home Builders
National Association of REALTORS*

¹⁸ See Sarah C. Young & Megan Booth, *Private Transfer Fee Coalition Letter*, available at <http://www.realtor.org/articles/private-transfer-fee-coalition-letter>.

1. Activity at the State Level

A majority of U.S. jurisdictions' laws now explicitly address private transfer fees. Before the 2010 legislative sessions, only California, Texas, Florida, Missouri, Kansas, and Oregon had laws regarding the fees. Over the next three years, the topic was a popular one in state legislatures as numerous jurisdictions added prohibitions, but the pace of new legislation recently slowed considerably. Between April 2014 and July 2015, no additional states enacted new laws prohibiting private transfer fees.

2. Permitted Private Transfer Fees

California stands alone in that its state law generally permits transfer fees that are imposed by a deed, contract, security instrument, or other transfer document.¹⁹ As noted above, other states, such as Texas, allow PTFs only under certain specified circumstances (such as when the fees are paid to the property owners' association that manages or regulates a subdivision, the association's managing agent, a charitable entity, or a governmental entity). Note, however, that all states that generally prohibit private transfer fees list certain payments and circumstances as exclusions from their "private transfer fee" definitions, or provide that specific fees are not covered by the state's act prohibiting private transfer fees.²⁰

¹⁹ [Cal. Civ. Code §§ 1098, 1098.5 \(2014\)](#). Each state's statute is summarized in the Appendix, with a hyperlink to the statutory authority.

²⁰ For more specific information on this and other issues for each jurisdiction, see the 2015 Annual Report, *Private Transfer Fees*, available to all NAR[®] members at lrc.legalebook.com.



In Oregon, for instance, the most recent state to amend its list of excluded fees, as of January 1, 2016, that state's prohibition of private transfer fees will *not* apply to:

- an instrument that conveys or contracts to convey a fee simple interest in real property and that provides for a grantee to pay consideration to a grantor for the real property interest being transferred, including any additional consideration based on any subsequent appreciation, development, or sale of the property;
- a requirement in a mortgage loan agreement for paying mortgage principal, interest, and fees upon [the] mortgagee's sale of the property;
- a "limited liability company, limited liability partnership, corporation, joint venture or partnership agreement in which a member, shareholder, joint venturer or partner contributes real property" to the entity;
- an agreement that provides for a series of related transfers of the fee simple interest in a real property, provided the agreement identifies the price, all consideration, party names, and other essential terms for each transfer;
- certain affordable housing covenants, servitudes, easements, conditions, or restrictions if (a) the proceeds are used exclusively to benefit the property, or to support activities that directly benefit the property's residents; and (b) the instrument is executed by a public body; a federal agency; a public benefit corporation, religious corporation, or foreign corporation, if the corporation's purposes include providing affordable housing for low and moderate income households (or a limited liability company that has a membership composed of such corporations); a consumer housing cooperative;

a manufactured dwelling park nonprofit cooperative; or a federally recognized Indian tribe;

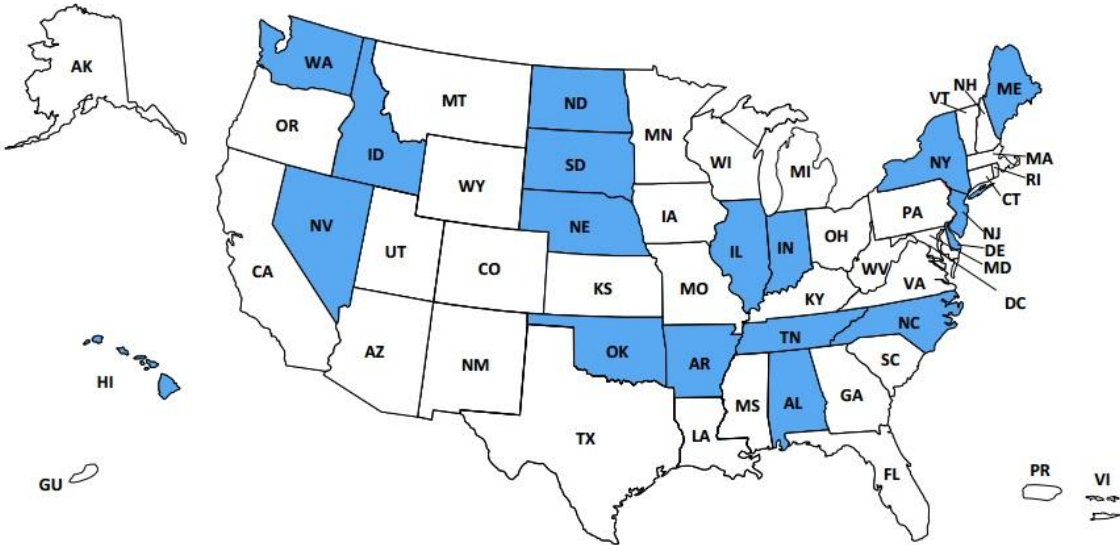
- a requirement for the payment of a fee to specified homeowners' associations; associations of unit owners; managing entities of timeshare plans; other owners' associations governed by recorded covenants, conditions, and restrictions; and agents for certain associations or managing entities; or
- an agreement between a real estate licensee and a grantor or grantee that provides for a commission payable to the licensee for the real property transfer.²¹

A few states' statutes (Connecticut, Pennsylvania, South Carolina, and Texas) allow PTF provisions that were in place before the statutory prohibition date to continue to be enforced, particularly if recording and disclosure requirements were met. Far more states' statutes (Alabama, Arkansas, Delaware, Hawaii, Idaho, Illinois, Indiana, Maine, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, South Dakota, and Tennessee; see Figure 1 below), by contrast, specifically state that no presumption of validity will be applied to private transfer fee agreements entered into before the date they became statutorily prohibited. Washington is a bit of a hybrid state, in that there is no presumption of validity for agreements entered into before PTFs became prohibited, but the statute also notes that such an obligation may be enforced if notice was recorded before that date.

²¹ [Or. Rev. Stat. § 93.269 \(2013\)](#) (as amended by [2015 Or. Laws ch. 436 \(H.B. 3488\)](#)).

Figure 1.

**States with No Presumption of Validity for PTFs
Created Before Statutory Prohibition**



(AK, HI, and territories not drawn to scale)

3. *Limitations on Private Transfer Fees*

Currently, 43 states²² explicitly prohibit private transfer fees in most situations.

These states are shown in the map in Figure 2 below.

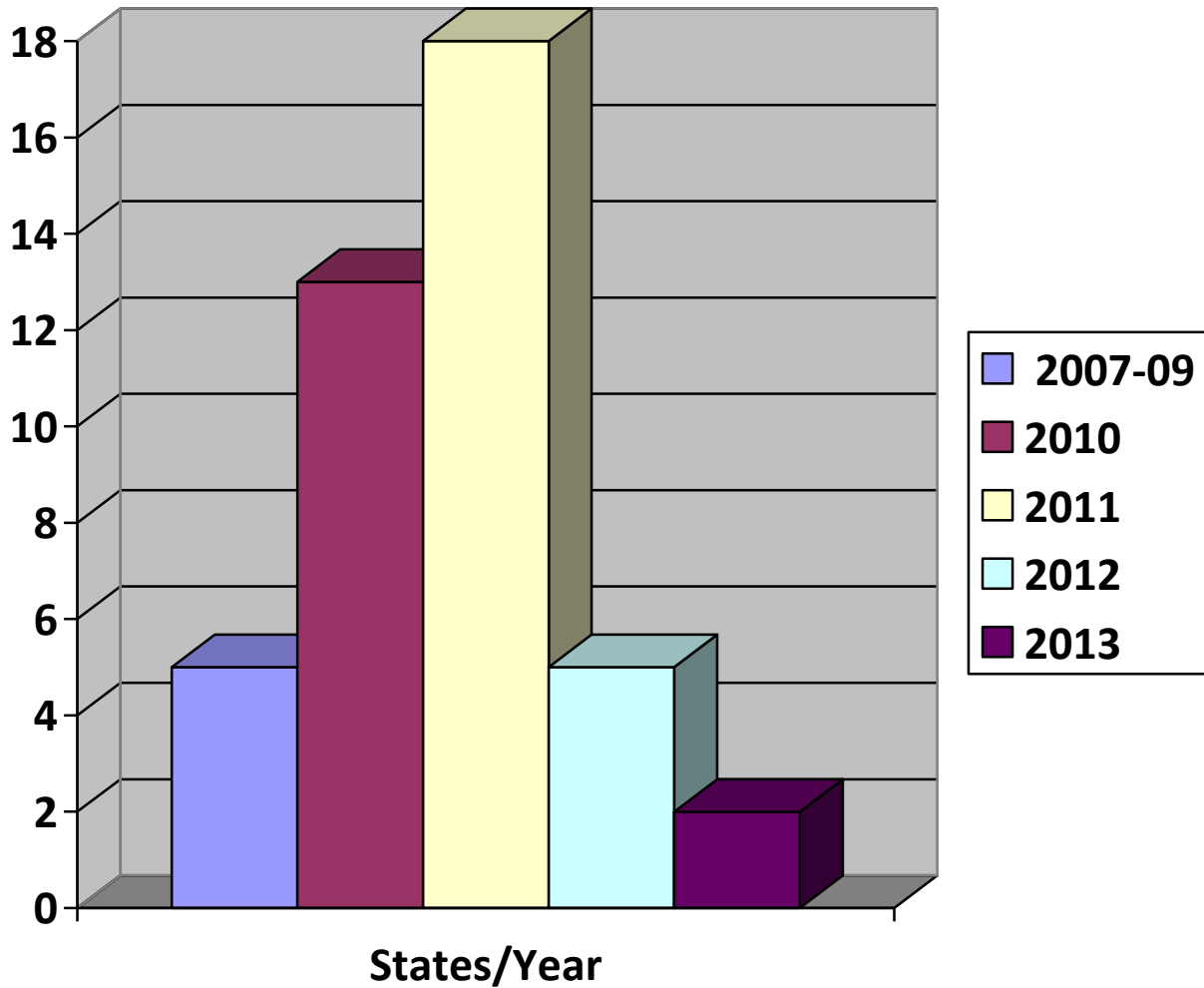
²² AL, AK, AZ, AR, CO, CT, DE, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MI, MN, MS, MO, MT, NE, NV, NJ, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, WA, WY.

States that Prohibit PTFs in Most Situations



²³ See the *Private Transfer Fees* Annual Report for more specific information.

Figure 3. Number of States Legislating Against PTFs, by Year

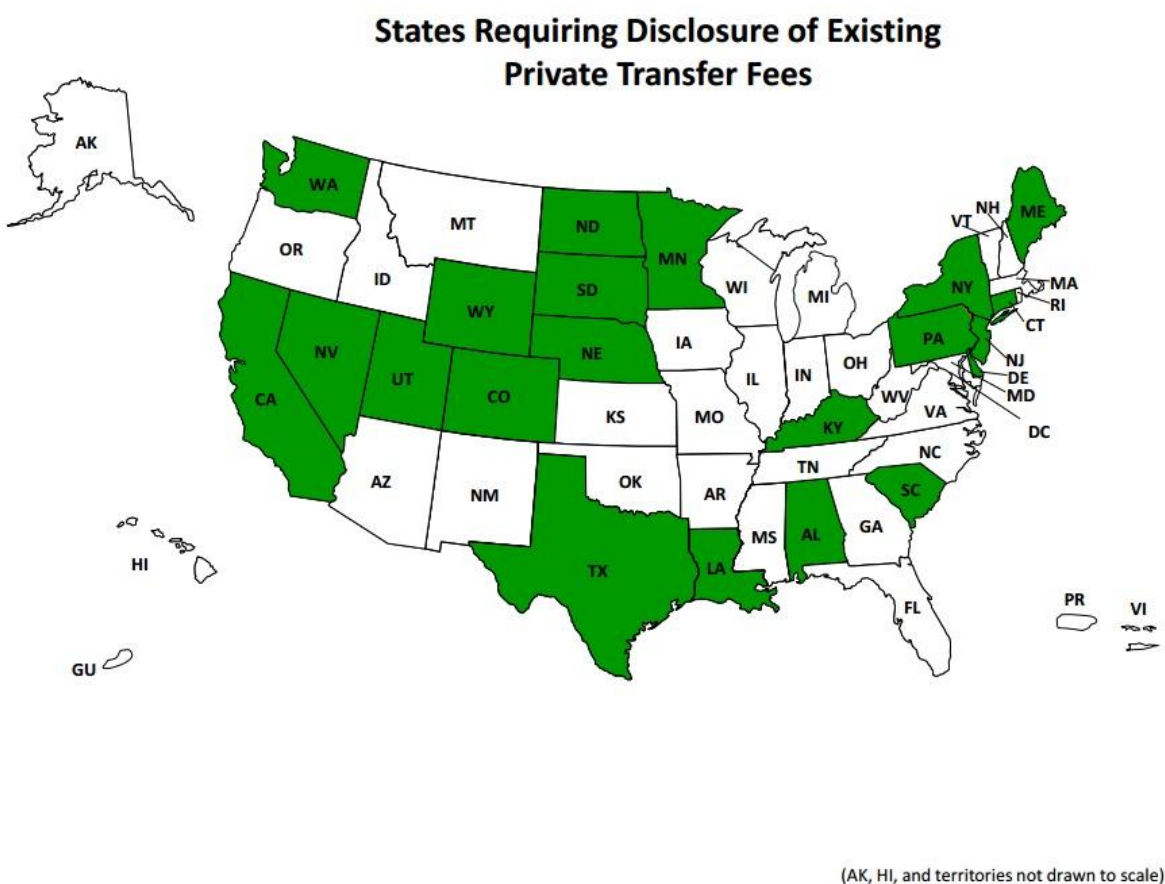


All states that prohibit private transfer fees also provide that the prohibited fees, liens, or covenants are void or unenforceable. Typical provisions may address liability, a party's failure to record required documents related to previously existing private transfer fees, or a payee's failure to respond to a written request for fee information.

4. Disclosure Requirements

Several states require some form of disclosure for existing private transfer fees. Most of those provisions were added during the 2010, 2011, and 2012 legislative sessions. Twenty-one jurisdictions²⁴ now require disclosure of private transfer fees or private transfer fee obligations.²⁵ See Figure 4 below. Alaska law contains certain disclosure requirements for similar fees in the narrow context of a rental agreement between a mobile-home park operator and a mobile-home park tenant.

Figure 4.



²⁴ AL, CA, CO, CT, DE, KY, LA, ME, MN, NE, NV, NJ, NY, ND, PA, SC, SD, TX, UT, WA, WY.

²⁵ See the *Private Transfer Fees* 2015 Annual Report for updated disclosure requirements in each jurisdiction.

5. Licensee Responsibility

Only a few states explicitly address a licensee's responsibility regarding private transfer fees.²⁶ For example, California's statutes delineate specific licensee responsibilities, Alabama law explicitly provides that real estate licensees have no duty to discover private transfer fees, and Kentucky law states that liability related to a private transfer fee is assessed against the principal rather than the agent. However, although the other jurisdictions have no specifically applicable provisions, laws in 48 jurisdictions²⁷ include general licensee duties to buyers that may require a licensee to disclose private transfer fees, even if the fees apply only to future transactions.

PTF-related laws may be very general, such that it may not be readily apparent that they apply to PTFs, or very specific, so that they are not well known in the broader real-estate context. As for the generally applicable laws, recall the disclosure requirements discussed above, which often apply to real-estate licensees in general and may be heightened by the existence of a PTF covenant. Minnesota law, for example, generally limits the term of *any* long-term private covenant to 30 years, which would also apply to PTFs.²⁸ As for the specific provisions, as noted above, Alaska prohibits transfer fees in rental agreements between a mobile-home park operator and a mobile-home park tenant: no contract may require either a tenant selling his or her mobile home to another party or a party desiring to purchase a mobile home from a

²⁶ Licensee responsibility in each jurisdiction is also addressed in the 2015 *Private Transfer Fees* Annual Report.

²⁷ AL, AK, AZ, AR, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, PR, RI, SC, SD, TN, UT, VT, VI, VA, WA, WI, WY.

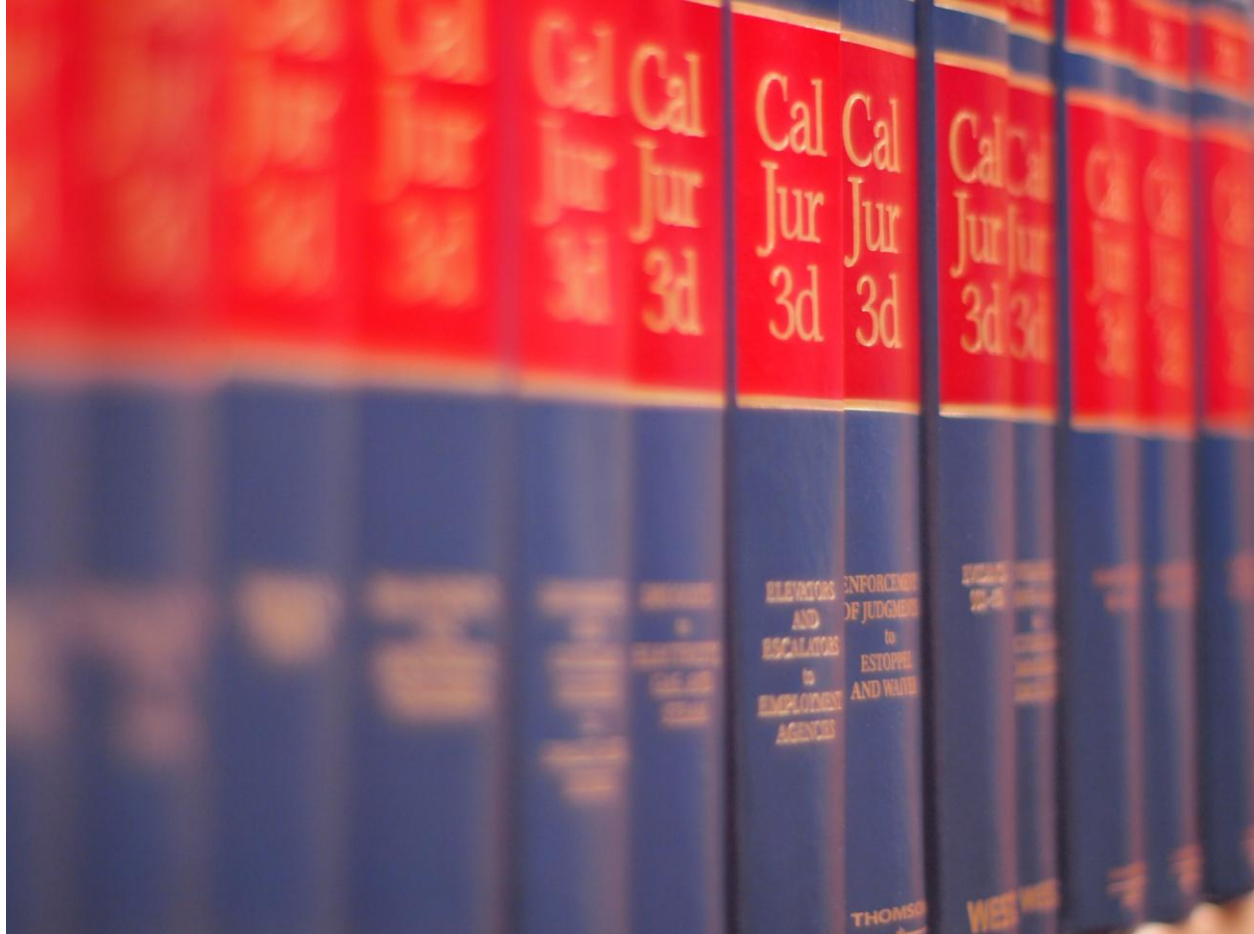
²⁸ [Minn. Stat. § 500.20 \(2014\)](#).

tenant to pay a transfer fee.²⁹ And Pennsylvania law permits a condominium unit owners' association, a cooperative association, or a planned community unit owner's association to "impose a capital improvement fee, but no other fees, on the resale or transfer of units."³⁰

As these examples indicate, the scope and form of PTF regulation varies widely. Professionals involved in real estate transactions should familiarize themselves with the broad range of sources and types of potentially applicable PTF laws and rules.

²⁹ [Alaska Stat. § 34.03.040\(c\)\(3\) \(2014\)](#).

³⁰ [68 Pa. Stat. Ann. §§ 3302 \(a\)\(12\), 4302\(a\)\(12\), 5302\(a\)\(12\) \(2014\)](#).



II. Issues with Private Transfer Fees

The many potentially troublesome aspects of private transfer fees are largely what drove the legislative and regulatory efforts against them. The FHFA noted in particular its concern that private transfer fees could be used to fund private continuous streams of income for select market participants, either directly or through securitized investment vehicles. Accordingly, they may not benefit homeowners or the properties involved, and therefore could impair the safety and soundness of the regulated entities that invest in or purchase mortgages secured by such properties.³¹ The FHFA also noted a concern about the adequacy of disclosure of these covenants, which could impede the marketability and valuation of the encumbered properties. Consumers may be unaware that a fee applies, even if the resale price of their property falls below the original purchase price.³²

Although now prohibited in many places, not all private transfer fees are banned, and pre-existing PTFs continue to lurk and may do so for many years to come. It therefore remains important to know what issues to look out and prepare for.

A. Practical and Short-Term Implications

Aside from the obvious direct issues associated with PTFs, there are other effects to consider from the perspective of the parties involved.

1. Impact on Home Sales

Where PTFs are allowed, they can present problems with regard to both their immediate practical application and their long-term enforcement and effectiveness. One

³¹ See Federal Register, *Private Transfer Fees* (Mar. 16, 2012), available at <https://www.federalregister.gov/articles/2012/03/16/2012-6414/private-transfer-fees>.

³² *Id.*

problem that could have *both* short- and long-term consequences relates to PTFs' potential impact on real-estate sales. REALTORS® worry that PTFs could increase the cost of homes or, upon their discovery, result in the cancellation of purchase agreements.³³

Back in 2008, a representative of [Lennar Builders](#) disputed that concern. He said that, at that time, Lennar had been imposing transfer fees for about five years, and had sold over 25,000 homes with the fees in place, yet he could “count on one hand” the number of times a problem with the fees has arisen.³⁴ In those cases where there was a problem, he said, it disappeared once the fees were fully explained to the buyers.³⁵ “The amount of the fee is relatively small,” the Lennar official stated, and he was aware of no case in which someone refused to purchase a home simply because of a PTF.³⁶

The FHFA viewed this issue a bit differently, recognizing that “the impact of transfer fees on property values is uncertain and potentially adverse because of uncertainty over how often the property will be sold during the duration of the covenant.”³⁷ For that reason, and because property values go up and down and

³³ NAR®, *Private Transfer Fees*, *supra* n.1, available at <http://www.realtor.org/topics/private-transfer-fees>.

³⁴ Name Withheld, Lennar Builders, Telephone Interview (Mar. 21, 2008).

³⁵ *Id.*

³⁶ An opinion piece in the Orange County Register quoted a representative of Lennar Homes as stating that, “if you’re fortunate enough to buy a home, it’s [PTFs] an opportunity to help someone less fortunate.”³⁶ Lennar fully discloses the fees up front, he said, and he further defends PTFs by stating that the company gets no benefits from the fees, and that there are tight restrictions on how the money may be used. See S. Greenhut, *A Stealth Tax on Homeowners*, The Orange County Register, Mar. 11, 2007, updated Aug. 21, 2013, available at http://www.ocregister.com/ocregister/opinion/columns/article_1610764.php.

³⁷ Federal Register, *Private Transfer Fees*, *supra* n.31, available at <https://www.federalregister.gov/articles/2012/03/16/2012-6414/private-transfer-fees>.

therefore the fees do as well (in the majority of cases, in which they are a percentage of property value), the fees paid are likely to not be aligned with the value received in return, causing potential concerns for a host of affected and interested parties (e.g., buyers, sellers, lenders, and investors).³⁸

2. Title and Lending Problems

Another specific problem of the more immediate variety, as identified by real estate experts, relates to title to the subject property. If, for instance, the original seller signs a purchase agreement with the original buyer to sell fee simple title to the property (which is, in essence, title with no restrictions), and then the seller attempts to reserve a portion of that title via a PTF covenant prior to closing on the sale, the purchase agreement has been breached.³⁹

Carrying this title thread forward, if the PTF servitude is included in the closing package provided to the buyer, it may violate the standard instructions from the lender on what are acceptable exceptions from title.⁴⁰ Senior Counsel for one major title company explained that because the fees are a small percentage of the sale price, buyers may not initially notice them.⁴¹ Still, they result in a restriction on the deed. As noted above, once Fannie Mae and Freddie Mac became aware of the fact that some private entities were promoting the fees as an investment vehicle, but not necessarily explaining them to unwary buyers, the lenders refused to deal in loans for property to which the covenants attached. From the title company's own perspective, however, the

³⁸ *Id.*

³⁹ Ramseyer Bardwell & Durham, *supra* n.2, at 28.

⁴⁰ *Id.*

⁴¹ Name Withheld, Senior Underwriting Counsel, Telephone Interview (Mar. 24, 2008).

Senior Counsel observed that there is actually little concern over the existence of the deed restrictions, as long as the company is aware of them.⁴²

A PTF May Cost More than Expected

In some cases, the PTF obligation is secured by a lien against the land subject to the PTF. Thus, if the PTF is not paid as required, the party owed the PTF will have a claim against the real property.

This claim will be of considerable concern to title companies and lenders. Lenders require a “clean” title policy upon financing a purchase, which insures the first priority of its mortgage. A title company will be asked to insure that there is no lien interest currently held in the property by the party owed the fee. This may be easy early in the life of the PTF requirement, but may be more challenging twenty years down the line.

If the fee-owed party is unavailable to waive any right in the real property, someone will be required to accept the risk that the fee-owed party will show up in a few years requiring payment of the fee or threatening to exercise its interest in the property. The title company may be willing to accept this risk for a higher premium, ultimately resulting in a cost passed down to the consumer.

⁴² Senior Underwriting Counsel, *supra* n.41.

B. Long-term Concerns: Impediments to Legal Enforcement

In addition to the potential long-term impact on home sales, many in the industry anticipate litigation over PTFs.

1. Failure to Disclose and Fraud

Along with the title problems that may arise from PTF covenants, breach-of-contract claims are a distinct possibility. Another potential claim concerns the failure to disclose PTFs. Bernard Kolodner,⁴³ who has served as Chair of the Commercial Real Estate Transactions Group in the Real Property Division of the Real Property, Trusts and Estates Section of the American Bar Association, as well as Chair of the Easements, Covenants and Restrictions Committee, recognizes the potential for lawsuits over the fees based on fraud and non-disclosure, particularly when there is substantial money at stake.⁴⁴



Along the same lines, the FHFA has recognized the lack of transparency as a significant issue. There is no price transparency, the FHFA says, because buyers are not offered a choice between a property encumbered by the transfer fee covenant and

⁴³ Mr. Kolodner is a partner at the Philadelphia, Pennsylvania law firm of [Kleinbard LLC](#).

⁴⁴ Bernard Kolodner, Esq., Partner, Kleinbard LLC, Telephone Interview (Mar. 17, 2008).

the same property at a different price without the covenant. Moreover, in many cases the transfer fee is not assessed against the first buyer, making the covenant less likely to be reflected in the initial sale price and more likely to be a surprise upon resale. It is difficult to predict the effect of the covenant on the property's value upon resale to subsequent buyers.⁴⁵

The FHFA also noted that in complex real estate transactions, PTFs are not normally discoverable until well after the sale contract is executed, when a title search is performed prior to closing. This lack of disclosure could affect whether the price will need to be renegotiated at the last minute, or whether the sale will even close at all.⁴⁶

2. *Non-possessory Interests*

PTFs may be subject to other legal challenges as well. Generally speaking, any recognizable estate (or interest) in property requires that there be a present or future right to possess that property.⁴⁷ If transfer fee rights are viewed as an attempt by the original seller to retain part of the fee simple title to the property without having any right of present or future possession, they arguably create a new type of estate in land, and courts have demonstrated an unwillingness to recognize new types of estates in land.⁴⁸ This reluctance respects the long history of “Old Man” property law, which has been tested and tried over hundreds of years in the Anglo-American system.

⁴⁵ Federal Register, *Private Transfer Fees*, *supra* n.31, available at <https://www.federalregister.gov/articles/2012/03/16/2012-6414/private-transfer-fees>.

⁴⁶ *Id.*

⁴⁷ Ramseyer Bardwell & Durham, *supra* n.2, at 28.

⁴⁸ *Id.* at 28 (citing *Johnson v. Whiton*, 34 N.E.542, 542 (Mass. 1893)).

Sticks May Break a PTF's Bones

Other than as a “servitude,” the only other conceivable way for a PTF advocate to characterize the PTF under real property law is as a “future interest.” In students’ first semester of law school, their real property professor takes great pains to open their minds to the legal nature of property. The goal is for them to understand that property, in the eyes of the law, does not constitute what they physically see—land and buildings—but rather relates to how the law recognizes rights in those items. Legal property constitutes a “bundle of sticks” that can be separated and provided to more than one individual.

Some of these sticks are identified as “future interests.” A “future interest” is a current right to enjoy property at a future time (e.g., you may grant someone now the right to use your property after your death). Future interests developed as the British Crown recognized diverse property rights in feudal England. Six recognized future interests were well-defined when they reached the Colonies, and there has been very little change since then. Old Man Real Property believes strongly in the stability and clarity that the current system provides. For recognition as a future interest, the advocates of the PTF would be asking state courts to add sushi to what has been a menu of Yankee Pot Roast for hundreds of years.

3. *Restraints on Alienability*

One of the major legal tenets of property ownership is the ability to freely convey the subject property to others.⁴⁹ PTFs could be viewed as an impermissible restraint on the alienation of property, and restraints that infringe on that ability are often deemed invalid.⁵⁰ A court could refuse to enforce a PTF covenant on this basis alone.

4. *“Touch and Concern” the Land*

If a court were to view a PTF covenant as a “servitude” on the property, it may be deemed invalid because it does not meet the legal requirements typically applied to

⁴⁹ *Id.* This concept is embodied in the Restatement (Third) of Property, a recognized authority on property law.

⁵⁰ Ramseyer Bardwell & Durham, *supra* n.2. Restatement (Third) of Property § 3.1 provides that

[s]ervitudes that are invalid because they violate public policy include, but are not limited to:

- (1) a servitude that is arbitrary, spiteful, or capricious;
- (2) a servitude that unreasonably burdens a fundamental constitutional right; [and]
- (3) *a servitude that imposes an unreasonable restraint on alienation*

(Emphasis added.)

servitudes under the common law. A *servitude* is defined as “[a]n encumbrance consisting in a right to the limited use of a piece of land or other immovable property without the possession of it,”⁵¹ or “a right by which something (as a piece of land) owned by one person is subject to a specified use or enjoyment by another.”⁵² An example of a servitude is the right of an adjoining property owner to use a driveway on the “servient” property to get to her adjoining property.

In order for such a restriction on the land’s use or ownership to apply to a future owner, it must satisfy certain requirements, including that there be a writing evidencing such an intention, and that the servitude “touch and concern” the land, which means that the agreement affects or is bound up in the use of the land.⁵³ (See sidebar.)

A PTF May Not Be “Touchy-Feely” Enough

PTF advocates argue that the PTF is a valid “servitude” like any other covenant, condition, or restriction (“CCR”). Most CCRs pass required legal tests for their enforceability against subsequent owners without notice, making them enforceable if, among other things, the CCR “touches and concerns” the land.

Just what meets the “touch and concern” requirement is difficult to describe. A restriction that prohibits an owner from painting her home neon green clearly touches and concerns the land – it restricts what the homeowner can do with the land and also preserves the value of her and her neighbor’s property. Covenants that require payment of a fee to a home owners’ association have been found to “touch and concern” the land, when the proceeds of the fee are used for improvements benefiting the property owner. *See, e.g., Neoponsit Prop. Owners’ Ass’n, Inc. v. Emigrant Indus. Sav. Bank*, 19 N.E.2d 793 (N.Y. 1938). Covenants that result in personal benefit to a developer (e.g., an exclusive right to serve as the builder on a property) are generally found *not* to meet the requirement. *E.g., Caullett v. Stanley Stilwell & Sons, Inc.*, 170 A.2d 52 (N.J. Super. Ct. App. Div. 1961).

⁵¹ Black’s Law Dictionary (8th ed. 2004).

⁵² See Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/servitude>.

⁵³ Ramseyer Bardwell & Durham, *supra* n.2, at 29. The touch-and-concern doctrine originated in *Spencer’s Case*, 5 Co. Rep. 16a, 77 Engl. Rep. 72 (1583), in which the court stated that “if the thing to be done be merely collateral to the land, and doth not touch and concern the thing demised in any sort,” the tenant’s covenant would not bind the tenant’s assignee.

A covenant is said to touch and concern the land when it enhances the enjoyment of one parcel of real property by burdening the enjoyment of another.⁵⁴ An example of a modern covenant that touches and concerns the land is a homeowners' association requirement that all property owners paint their homes a neutral color. A transfer fee servitude, while probably satisfying the writing requirement, arguably has no effect on the use of the land, and so could be legally challenged on that basis. Note, however, that the touch-and-concern requirement is not rigidly enforced in a few states, and therefore may not pose a serious impediment to the enforcement of PTF agreements.⁵⁵

Curt Sproul,⁵⁶ Co-chair of the State Bar of California Real Property Section's Common Interest Development Subsection, agreed that, in California, a covenant that runs with the land must touch and concern that land. In his opinion, however (provided in 2008), PTFs do in fact touch and concern the land, and he cited this characteristic as one of their positive attributes.⁵⁷ "[A] fee covenant imposed on land located in the Martis Valley of California could not be imposed to provide funding for land acquisition for open space purposes in Arizona," Sproul explained. Rather, "[a] covenant . . . that is imposed to provide a means of funding the acquisition of more open space in Martis Valley[,] or to preserve the Balona Wetlands, confers an arguable benefit (i.e., an 'improvement')

⁵⁴ Boyer, *The Law of Property: An Introductory Survey* 321 (4th ed. 1991).

⁵⁵ Ramseyer Bardwell & Durham, *supra* n.2, at 29. In fact, Restatement (Third) of Property § 3.2 has suspended the application of the touch-and-concern requirement, providing that "[n]either the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a servitude."

⁵⁶ Mr. Sproul is a principal in the Roseville, California, firm of [Sproul Troust LLP](#), and has written and published on subjects relating to PTFs.

⁵⁷ Curt Sproul, Esq., Principal, Sproul Troust LLP, E-mail Correspondence (Mar. 16, 2008).

on the use and enjoyment of lands burdened by the covenant that are in the immediate region where the new communities are being developed.”⁵⁸

Scott Jackson, an Irvine, California, attorney who serves on the board of the [Lennar Charitable Housing Foundation](#) (associated with the homebuilder of the same name), pointed out the difference between investment-vehicle PTFs and those designed to benefit the community.⁵⁹ When NAR[®] spoke with Jackson in 2008, he stated that he did not believe that investment-type fees are enforceable as covenants running with the land, because there is nothing about those fees that touches and concerns the land, he says. On the other hand, Jackson stated, fees that go to community or environmental organizations to provide some amenities in the same community clearly touch and concern the land and would therefore, in his opinion, be enforceable.⁶⁰

The FHFA acknowledged that private transfer fee covenants present questions of legal enforceability, especially when they are not associated with direct benefit to the burdened property, when considering the regulation preventing Freddie Mac and Fannie Mae involvement with mortgages “tainted” by PTFs.⁶¹

⁵⁸ *Id.*

⁵⁹ F. Scott Jackson, Esq., Shareholder, [Jackson DeMarco Tidus Peckenpaugh](#), a Law Corporation, Telephone Interview (Mar. 25, 2008).

⁶⁰ *Id.*

⁶¹ Federal Register, *Private Transfer Fees*, *supra* n.31, available at <https://www.federalregister.gov/articles/2012/03/16/2012-6414/private-transfer-fees>.

5. Taxation

Many observers—even those integrally involved with PTFs—often call the fees private transfer *taxes*.⁶² The [California Association of REALTORS®](#), an outspoken opponent of PTFs and sponsor of legislation to prohibit or restrict them, has consistently referred to the fees in this manner.⁶³ Although some assert that PTFs are *not* taxes because they are not imposed by governmental entities,⁶⁴ to the extent that they are deemed tax-like fees, they raise another potential legal conflict.

A basic premise underlying the formation of this nation was the well-known colonial battle cry, “No taxation without representation!” Although American citizens may not directly vote for or approve each new tax that is imposed upon them, they do have the opportunity to vote for the elected officials who are responsible for enacting tax legislation—in essence, the nation continues to heed the colonists’ cry. Elected officials must answer to their constituents and face the possibility of being voted out of office if they support unpopular new tax regimes. But PTFs, being a creature of private-entity making, may escape that procedural safeguard and thereby violate one of the country’s

⁶² See, e.g., Daniel Miller, *Realtors Push Bill to Eliminate Developers’ Transfer Tax Fees*, Los Angeles Business Journal (Mar. 26, 2007) (stating that “private transfer **taxes** . . . **tax** the transfer of property”; that “[i]t is unclear exactly when the **tax** was first used by developers”; that “private transfer **taxes** are used for things like community projects and habitat preservation”; that “the **tax** is not regulated”; and that “a Lake Tahoe-area development charges a 1.75 percent transfer **tax**”) (emphasis added). Quigley, *supra* n.3, *A New Buyer’s Burden—An Emerging Type of Transfer Fee Can Add Thousands of Dollars to Closing Costs*, available at <http://realtomag.realtor.org/news-and-commentary/feature/article/2007/09/private-transfer-taxes-new-buyers-burden>; Greenhut, *supra* n.36, *A Stealth Tax on Homeowners*, available at http://www.ocregister.com/ocregister/opinion/columns/article_1610764.php.

⁶³ See News Release, *Private Transfer Taxes—C.A.R. Sponsors Legislation to Protect Californians from Private Transfer Taxes that Cost Home Buyers Thousands and Negatively Impact Affordability* (Feb. 28, 2007), available at <http://www.car.org/index.php?id=MzcxMTQ>. Real estate blogs, too, decry “private transfer taxes,” or “PTTs,” citing lack of regulation and the potential for litigation as two major pitfalls. See, e.g., *Private Transfer Fee Alert* (Mar. 15, 2007), available at <http://activerain.com/blogsvieview/58476/Private-Transfer-Fee-Alert>.

⁶⁴ See, e.g., Bob Hunt, *Legislative Support for Private Transfer Taxes*, Realty Times (June 22, 2007), available at http://realtytimes.com/rtpages/20070622_privatetaxes.htm.

most basic founding principles. PTFs that are the subject of legislation, like those in California, may hold truer to these principles. But bear in mind that the fees—or taxes, as it were—existed before the legislation did, leaving the door wide open for plenty of so-called “taxation without representation.”

Senior Counsel for a major title company points out how this problem can arise even with regard to publicly imposed PTFs, like those permitted in one Colorado locale before that state enacted its private transfer fee ban. The local law provided that the fees must go to a benevolent trust or specifically provide for affordable housing in the community. Although the money was collected because of a public ordinance, she says, there was no public control over how the money was used. In such situations, “[t]here is no accountability or public oversight, no way to vote against the use of the fee (as there would be if it were ordinary tax money spent by a public body). This type of fee amounts to ‘taxation without representation.’”⁶⁵

Given that the characterization of PTFs as taxes is not truly a legal classification, however, it is doubtful that a legal challenge on this basis would be recognized in the courts. Nonetheless, the fact that many view PTFs as taxes does little to increase their general popularity.

6. *Rule Against Perpetuities*

Another potential legal challenge to PTFs relates to their duration. Nearly every lawyer alive will likely cringe at the mere mention of the dreaded Rule Against Perpetuities, that most nebulous and confounding of all property-law rules, which frustrates and perplexes virtually every new law student. Perhaps more a monster of

⁶⁵ Name Withheld, Senior Underwriting Counsel, Telephone Interview (Mar. 24, 2008).

trust-and-estate law than *real-estate* law, the Rule is a codification of the common-law doctrine against tying up property indefinitely (which relates, in a sense, to the free alienability of property and the courts' distaste for restraints on alienation).

The Rule Against Perpetuities states, generally, that an agreement is void if it provides for an interest in property that will not (or may not) vest within 21 years after the end of any "life in being" at the time the agreement is made.⁶⁶ As applied in the present context, a PTF covenant of unlimited duration arguably ties up title to the subject property for more than 21 years after the end of the lives of everyone involved in the initial transfer. Accordingly, the Rule may provide another avenue of attack against PTFs, for those brave enough to venture into such unpredictable waters.⁶⁷

Thus, although there are already a variety of potential legal impediments to the enforcement of PTFs, most of the potential challenges are untested.⁶⁸ When NAR spoke with Scott Jackson, a Director of the [Lennar Charitable Housing Foundation](#), he

⁶⁶ See, e.g., the explanation of the Rule provided by law.com (stating the Rule Against Perpetuities as "the legal prohibition against tying up property so that it cannot be transferred or vest title in another forever, for several future generations, or for a period of centuries. The maximum period in which real property title may be held without allowing title to vest in another is 'lives in being plus 21 years.' Therefore, a provision in a deed or will which reads, 'Title shall be held by David Smith and, upon his death, title may only be held by his descendants until the year 2200, when it shall vest in the Trinity Episcopal Church,' is invalid"), *available at* <http://dictionary.law.com/default2.asp?selected=1872&bold=>.

⁶⁷ The Rule Against Perpetuities is so complex that a California court once ruled that an attorney who misapplied the Rule was *not* liable for malpractice. See [Lucas v. Hamm](#), 56 Cal. 2d 583, 15 Cal. Rptr. 821 (1961). Restatement (Third) of Property § 3.3, cmt. a has rejected the rule, however, stating that "servitudes and powers to create servitudes are immune from invalidation under the rule against perpetuities, even though they create specifically enforceable contingent rights to acquire land or interests in land in the future. However, servitudes are subject to the rules against restraints on alienation"

⁶⁸ An online search conducted in April 2008 for reported cases involving "private transfer fees" or "private transfer taxes" retrieved no results. In July 2015, only two cases were located involving "private transfer fees" or "private transfer taxes". In *CoreFirst Bank & Trust v. JHawker Capital, LLC*, 282 P.3d 618 (Kan. Ct. App. 2012), the court held that liability was not shown for failure to include proposed deed restrictions because they were transfer fees that had been declared void and unenforceable. The other case, a California federal case against the FHFA, was later vacated and dismissed.

recalled only one Arizona case involving PTFs. The developer in that case had entered into an agreement with an environmental group to collect the fees, which would initially be collected by the homeowners' association and then paid to the developer, who would turn the money over to the environmental group. When the make-up of the homeowners' association board changed, Jackson said, it decided not to remit the fees to the developer, who then brought suit for an injunction compelling payment. The case settled out of court. Jackson guesses that the outcome may not have favored the developer, because it can be hard to prove the covenant's requisite connection to the land in such cases.⁶⁹

⁶⁹ F. Scott Jackson, Esq., Interview, *supra* n.59.

C. Potential Benefits

Although many take issue with PTFs, some builders and developers still like the idea. PTF covenants may at least partially relieve builders and developers of the burden of spending their own money to fund environmental interests, such as satisfying environmentalist groups' demands that they preserve a certain amount of open space when planning a new housing development.⁷⁰

Building industry representatives argue that, in order to get their projects approved, they must satisfy significant demands from environmental groups and local interests that cost thousands upon thousands of dollars, which could result in significant increases in new home prices.⁷¹ If they had to pass these costs on to the original buyers, many potential homeowners could be shut out of the market. Spreading the costs out among future buyers is, builders argue, the fairer approach. Buyers actually benefit, they say, because preservation of nearby open land, for instance, increases their aesthetic enjoyment of their property, if not its economic value.⁷²

Some environmentalist groups, too, favor the use of PTFs, which can be used to help fund their interests, such as wetland and animal-habitat preservation.⁷³ One real-estate organization representative who was interviewed on the subject acknowledged that many view PTFs to be a “win-win” proposition, as they raise money for new parks

⁷⁰ Quigley, *supra* n.3, *A New Buyer's Burden—An Emerging Type of Transfer Fee Can Add Thousands of Dollars to Closing Costs*, available at <http://realtormag.realtor.org/news-and-commentary/feature/article/2007/09/private-transfer-taxes-new-buyers-burden>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ The Sierra Club, for example, supported the California legislation favoring PTFs. See Bob Hunt, *Legislative Support for Private Transfer Taxes*, Realty Times (June 21, 2007), available at http://realtytimes.com/rtpages/20070622_privatetaxes.htm.

and other benefits without raising taxes.⁷⁴ [Freehold Licensing, Ltd.](#)—now Freehold Capital Partners—a privately held company that acts as the licensor in PTF transactions, also defended the fees in the original edition of this White Paper, arguing that they are an increasingly important source of funding for green space, environmental initiatives, and “other worthy causes.”⁷⁵

Sproul, Co-chair of the [Common Interest Development Subsection of the California Bar’s Real Property Section](#), noted when NAR originally corresponded with him that, with a few exceptions, many California transfer fees are imposed on properties in resort developments where the price of homes is already “sky high,” or in areas that are popular choices for second homes.⁷⁶ This trend means that PTFs should not impose a serious impediment to home ownership. Moreover, Sproul observed, the fees have been used to fund wetlands conservation, as well as community arts and civic projects, to the overall benefit of the entire community. “Although my practice is primarily focused on the representation of real estate developers,” Sproul explained, “many of my clients are very civic-minded and see a very distinct and positive benefit in coming into a community (such as the small town of Truckee in the Martis Valley) and providing that established community, of which they are about to become a part, with a means of funding either open space land acquisition, habitat preservation, or civic and cultural events.”⁷⁷

⁷⁴ Name Withheld, Contract Government Affairs Representative, Telephone Interview (Mar. 14, 2008).

⁷⁵ Press Release, *Transfer Fee Bill Passes Texas Legislature* (May 28, 2007). More information about Freehold Capital Partners is available at <http://www.freeholdcapitalpartners.com/>. When this White Paper was initially presented, representatives of Freehold failed to respond to multiple requests for interviews.

⁷⁶ Curt Sproul, Esq., *supra* n.57.

⁷⁷ *Id.*



In addition, Sproul noted, in states such as Colorado, transfer fees in common-interest developments could be used to fund the operations of the development's private owners' association, thereby reducing the need for association assessment increases. Many long-term renovation and facilities replacement or expansion projects cannot be adequately funded by ordinary and recurring association property-assessment revenues, he says, so PTFs can be used to serve this purpose. "Because transfer fees are a relatively minor cost of a real estate purchase and sale transaction and because most transfer fee covenants include hardship exemptions and exceptions for 'change of status transfers' (such as conveyances from an individual or spouses to a family trust), I believe their benefits far outweigh their burdens," Sproul opined.⁷⁸

While acknowledging these arguments, the real estate industry also identifies pitfalls in the pro-PTF rationale. In reality, they contend, there is too little regulation of PTFs: there is no limit on the amount that can be charged, and no restriction on the

⁷⁸ *Id.*

uses to which the funds can be put.⁷⁹ If the covenantor wanted to fund his children's, grandchildren's, and great-grandchildren's college educations, he could ostensibly demand that the money be set aside for that purpose. Even Sproul, an advocate of PTFs, acknowledged that there should be limitations on the use of the fees. The recipient organization, Sproul says, "should be a tax exempt 501(c)(3) or 501(c)(4) organization," with "a mission that is limited in scope solely to the region or community in which the development giving rise to the transfer fee is located," and that is "limited to causes such as the provision of affordable housing, open space preservation, the support of park and recreation activities, habitat restoration or preservation; or perhaps civic and community cultural events."⁸⁰ Sproul further asserted that the recipient organization should be independent from the project developer who imposed the fee.⁸¹

D. The New Normal for PTFs

There are arguments on both sides of the PTF fence. It is possible that a compromise could be reached, in which the developers get the financial breaks they seek, the environmental and civic-minded groups' interests are advanced, and real-estate licensees' interests are protected by placing appropriate restrictions on the use of PTFs. One thing that appears fairly certain is that PTFs that are designed strictly as investment vehicles are, for the most part, a thing of the past.

⁷⁹ See Quigley, *supra* n.3, *A New Buyer's Burden—An Emerging Type of Transfer Fee Can Add Thousands of Dollars to Closing Costs*, available at <http://realtormag.realtor.org/news-and-commentary/feature/article/2007/09/private-transfer-taxes-new-buyers-burden>.

⁸⁰ Curtis Sproul, Esq., *supra* n.57.

⁸¹ *Id.*

Industry insiders predict that, although the more benevolent covenants stand a better chance of proliferating, the prevalence of even those PTFs is not likely to skyrocket. Even in 2008, Scott Jackson, the California attorney who works with the Lennar Charitable Housing Foundation, did not think that there would be a significant increase in the number of PTFs imposed in the near future, except perhaps as a potential source of funds for environmental groups. Those groups are looking for funding, Jackson observed, and when developers are not able to foot the bills themselves, PTFs may provide a source of revenue.⁸²

A representative of [Lennar Corporation](#) (the homebuilder) observed that PTFs had not become the trend that builder/developers hoped they would be. In fact, he said, Lennar has offered to help other builder/developers create programs similar to the one it uses, but there were no takers as of the original interview. “When times are good, everyone’s too busy,” Lennar’s representative explained, “and when times are hard, there just isn’t the interest. It takes a lot of time and money to set up a program like this. A major commitment is involved.”⁸³

The Lennar spokesman did not anticipate that the California disclosure requirements would hurt Lennar’s program, but rather that they may actually help it. Lennar has always worked to ensure that buyers understood its PTF program, he said, and its disclosures even went beyond what the California law requires. Lennar “go[es] to great pains to make sure the program is understood,” and contrary to the real-estate industry’s objections, he stated, builders are not enriching themselves via PTFs—at

⁸² F. Scott Jackson, Esq., Interview, *supra* n.59.

⁸³ Name Withheld, Lennar Builders, Telephone Interview (Mar. 21, 2008).

least not Lennar. “The program actually costs Lennar money, but it has been well received.”⁸⁴

In California, at least, PTFs may be a growing trend, given the fact that California stands alone in its relatively permissive statutory scheme.

⁸⁴ *Id.*



III. Conclusion

Even though PTFs have faced strong opposition since the original publication of this White Paper, and most states and the federal government have created legal roadblocks to their creation, real estate professionals still need to be ready to meet PTFs head on if and when they do confront them. Most states allow pre-existing PTFs to continue, and even new ones may be created if (1) they comply with statutory limitations on purpose and (2) disclosure requirements are met. The following steps can help ensure REALTOR®-readiness and help prepare real estate professionals for the future.

- ☐ Familiarize yourself with what private transfer fees are and how they work. Peruse Internet sites on the subject, including REALTOR® websites and real-estate blogs.
- ☐ Locate the laws in your local and state jurisdictions, and determine whether there are limits on PTFs, certain disclosures are required, or there are other restrictions or requirements on their use.
- ☐ Consider both the very broad laws applicable to real-estate licensees in general, which may have particular import where PTFs are concerned, and very specific laws that may relate to PTFs in only certain, strictly limited contexts.
- ☐ Determine whether each sale in which you are involved includes property that is or may be subject to a PTF covenant.
- ☐ Educate yourself about the terms of that covenant so that you can fully and fairly inform the parties to whom you have an obligation.
- ☐ Monitor state legislative, as well as local county and municipal, activities to keep abreast of potential new laws or ordinances.

- Consider initiating or backing efforts to propose or support PTF legislation in states that have not acted.
- Add a provision to your form purchase agreement and addenda which requires disclosure of any PTF by the seller.

PTFs: for better or worse, the reality is that many real estate professionals will have to deal with them. This White Paper provides a strong foundation for industry insiders to stand on as they keep an eye out for PTFs in future transactions.

APPENDIX

Private Transfer Fee Laws

The majority of states and other U.S. jurisdictions currently have general provisions that prohibit PTFs under most circumstances. The following table summarizes those provisions and provides links to relevant state-level legislative authority where available.

Jurisdiction	General Rule	Citation
ALABAMA	A private transfer fee obligation recorded or entered into on or after May 5, 2011 is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee, and is void and unenforceable. There is no presumption that a private transfer fee obligation recorded or entered into before May 5, 2011, is valid and enforceable.	Ala. Code § 35-4-432 (2014)
ALASKA	A document that conveys real estate may not include a provision that requires a subsequent grantee or grantor to pay a transfer fee unless the fee is a loan assumption or similar fee, or a fee or commission paid to a licensed real estate broker.	Alaska Stat. § 34.15.105 (2014)
ARIZONA	A provision in a declaration, covenant, or other document relating to real property that purports to bind successors in title, and to require payment of a fee to a third person upon transfer of an interest in the property or in consideration for permitting a transfer, is not binding or enforceable.	Ariz. Rev. Stat. § 33-442 (2014)
ARKANSAS	A transfer fee covenant recorded after July 27, 2011 does not run with the property's title and is not binding or enforceable against the property or a subsequent owner, purchaser, or mortgagee. Transfer fee covenants recorded before July 27, 2011 are not validated by the law.	Ark. Code § 18-12-107 (2014)
CALIFORNIA	California law does not prohibit private transfer fees; however, a separate document titled "Private Transfer Fee Required" must be recorded concurrently with the instrument creating the transfer fee obligation.	Cal. Civ. Code §§ 1098, 1098.5 (2014)
COLORADO	A private transfer fee covenant relating to residential real property, or any lien to secure payment of such a fee, recorded on or after May 23, 2011 is not binding on or enforceable against the affected real property or any subsequent owner, purchaser, or holder of any security interest that encumbers the property.	Colo. Rev. Stat. § 38-35-127 (2014)
CONNECTICUT	Effective June 24, 2013, no private transfer fee obligations may be imposed. Any such obligation imposed on and after that date is void and unenforceable.	Conn. Gen. Stat. § 47-17a (2014)

Jurisdiction	General Rule	Citation
	A transfer fee entered into before June 24, 2013, is valid only if notice disclosing the fee agreement was filed in the land records prior to December 31, 2013.	
DELAWARE	A private transfer fee covenant recorded on or after July 27, 2010, does not run with the real property's title and is not binding on or enforceable against any owner, subsequent owner, purchaser, or mortgagee. A lien purporting to secure payment of a private transfer fee recorded on or after July 27, 2010, is void and unenforceable. Transfer fee covenants recorded before July 27, 2010 are not presumed valid.	Del. Code Ann. tit. 25, § 319 (2014)
DISTRICT OF COLUMBIA	No relevant provisions were located.	
FLORIDA	A transfer fee covenant recorded on or after July 1, 2008 does not run with the title to the property and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee. Any liens purporting to secure the payment of a transfer fee recorded on or after July 1, 2008 are void and unenforceable.	Fla. Stat. § 689.28 (2014)
GEORGIA	Restrictions or covenants running with the land that require a real property transferee or transferor to pay a fee in connection with the property's future transfer are prohibited.	Ga. Code Ann. § 44-14-15 (2014)
GUAM	No relevant provisions were located.	
HAWAII	Deed restrictions or other covenants that require a real property transferee to pay a fee in connection with a future transfer of the property are prohibited. Restrictions or other covenants that violate this provision or liens purporting to secure such rights are void and unenforceable. The law states that it does not imply that any particular deed restriction, covenant, or lien created or filed before June 22, 2010, is "valid per se."	Haw. Rev. Stat. §§ 501-232, 502-112 (2014)
IDAHO	A transfer fee covenant recorded after March 22, 2011, or any lien to secure a transfer fee payment, is not binding on or enforceable against the affected real property, or against any subsequent owner, purchaser, or mortgagee. The law states that it does not imply that a transfer fee covenant recorded before March 22, 2011, is valid or enforceable.	Idaho Code § 55-3103 (2014)
ILLINOIS	A transfer fee covenant recorded on or after January 1, 2011, does not run with the real property's title and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee. Liens purporting to secure the payment of a transfer fee under a transfer fee covenant recorded in Illinois on or after January 1, 2011, are void and unenforceable. A transfer fee covenant or lien recorded <i>before</i> January 1, 2011, is <i>not</i> presumed valid and enforceable.	765 Ill. Comp. Stat 155/15 (2014)
INDIANA	A transfer fee covenant recorded after June 30, 2011 does not run with the title to the property, and is not binding or	Ind. Code § 32-21-14-4

Jurisdiction	General Rule	Citation
	enforceable against any subsequent owner, purchaser, or mortgagee. A lien purporting to secure payment pursuant to a covenant recorded after June 30, 2011, is void and unenforceable. Covenants or liens recorded before July 1, 2011, are not presumed valid and enforceable.	(2014)
IOWA	Effective April 23, 2010, a transfer fee covenant does not run with a real property's title and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee. A lien purporting to secure the payment of a transfer fee under a transfer fee covenant filed on or after April 23, 2010 is void and unenforceable.	Iowa Code § 558.48 (2014)
KANSAS	Transfer fee covenants are against public policy, void, and unenforceable. Transfer fee covenants do <i>not</i> run with the title to the property and are <i>not</i> binding or enforceable against any subsequent owner, purchaser, or mortgagee.	Kan. Stat. §§ 58-3821, -3822 (2014)
KENTUCKY	Private transfer fee obligations, whether recorded or not, are prohibited. Any instrument that attempts to create a private transfer fee obligation is void and unenforceable as against public policy.	Ky. Rev. Stat. § 382.794 (2014)
LOUISIANA	Private transfer fees violate public policy, regardless of the obligation's duration, the fee amount, or the method by which the private transfer fee is created or imposed. A private transfer fee obligation does not "create real rights" and is not binding on subsequent owners of immovables or on other third parties, whether or not recorded. Building restrictions may not impose on an immovable's owner (or his successors) the obligation to pay a fee or charge on the alienation, lease, or encumbrance of the immovable.	La. Rev. Stat. §§ 9:3131, 3132 (2014); La. Civ. Code art. 778 (2014)
MAINE	A private transfer fee obligation recorded or entered into on or after September 28, 2011, does not run with the real property's title, is not binding on or enforceable against a subsequent owner, purchaser, mortgagee, or holder of any interest in the real property, and is void and unenforceable. A private transfer fee obligation recorded or entered into before September 28, 2011, is not presumed valid and enforceable	Me. Rev. Stat. tit. 33, § 163 (2014)
MARYLAND	A person who conveys a fee simple interest in real property may not record a covenant against the property's title for the payment of a transfer fee. A covenant that requires a transfer fee upon the conveyance of a fee simple interest in real property is void.	Md. Code, Real Prop. § 10-708 (2014)
MASSACHUSETTS	No relevant provisions were located.	
MICHIGAN	A transfer fee covenant executed on or after May 24, 2011,	Mich. Comp. Laws §§

Jurisdiction	General Rule	Citation
	does not run with the title to the property and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee. A lien purporting to secure a transfer fee payment under a transfer fee covenant executed on or after that date is void.	565.882, .883, .891, .892, .893 (2014)
MINNESOTA	A private transfer fee obligation recorded, filed, or entered into on or after May 20, 2010, is void and unenforceable. The obligation does not run with the property's title and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee.	Minn. Stat. § 513.74 (2014)
MISSISSIPPI	Deed restrictions or other covenants that run with the land and require a transferee to pay a fee in connection with the property's future transfer are prohibited. A deed restriction or covenant that violates this prohibition, or a lien purporting to secure a right that violates this prohibition, is void and unenforceable.	Miss. Code § 89-1-69 (2014)
MISSOURI	A transfer fee covenant recorded on or after September 1, 2008 does not run with the title to the property, and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee of any interest in real property. Any liens purporting to secure the payment of a transfer fee under a transfer fee covenant recorded on or after September 1, 2008 are void and unenforceable.	Mo. Rev. Stat. § 442.558 (2014)
MONTANA	A transfer fee covenant (or a lien to enforce a transfer fee) does not run with the real property's title and is not binding upon or enforceable against any subsequent owner, purchaser, or mortgagee.	Mont. Code Ann. § 70-17-212 (2014)
NEBRASKA	A private transfer fee obligation recorded or entered into on or after March 10, 2011 does not run with the property's title, is not binding on or enforceable against any subsequent owner, purchaser, mortgagee, or trustee of any real property interest, and is void and unenforceable. A private transfer fee obligation recorded or entered into in Nebraska before March 10, 2011, not is presumed valid and enforceable.	Neb. Rev. Stat. § 76-3109 (2014)
NEVADA	On or after May 20, 2011, no person may create or record a private transfer fee obligation. A private transfer fee obligation created or recorded on or after May 20, 2011, is void and unenforceable. The prohibition does not validate or make enforceable a private transfer fee obligation that was created or recorded before May 20, 2011.	Nev. Rev. Stat. Ann. § 111.865 (2014)
NEW HAMPSHIRE	No relevant provisions were located.	
NEW JERSEY	A private transfer fee obligation that is recorded or entered	N.J. Rev. Stat. § 46:3-

Jurisdiction	General Rule	Citation
	into on or after December 8, 2010, is void and unenforceable. A private transfer fee obligation recorded or entered into on or after December 8, 2010, does not run with the title to real property and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee. Obligations recorded before December 8, 2010, are not presumed enforceable.	30 (2014)
NEW MEXICO	No relevant provisions were located.	
NEW YORK	A private transfer fee obligation recorded or entered into on or after September 23, 2011 does not run with the land, is not binding on or enforceable against an owner, purchaser, or mortgagee, and is void and unenforceable. A private transfer fee obligation recorded or entered into before September 23, 2011 is not presumed valid and enforceable.	N.Y. Real Prop. Laws § 473 (2014)
NORTH CAROLINA	Effective July 1, 2010, a transfer fee covenant or a lien that is filed to enforce a covenant or purports to secure payment of a transfer fee does not run with the property's title and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee. Transfer fee covenants or liens filed before July 1, 2010 are not presumed valid and enforceable.	N.C. Gen. Stat. § 39A-3 (2014); 2010 N.C. Sess. Laws ch. 32, § 3
NORTH DAKOTA	A private transfer fee obligation recorded or entered on or after August 1, 2011 does not run with the real property's title, is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee, and is void and unenforceable. A private transfer fee obligation recorded or entered before August 1, 2011, is not presumed valid and enforceable.	N.D. Cent. Code §§ 47-33-02 (2014)
OHIO	A transfer fee covenant recorded in Ohio on or after September 13, 2010, does not run with the real property's title and is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee.	Ohio Rev. Code § 5301.057 (2014)
OKLAHOMA	A transfer fee covenant recorded, filed, or entered into in on or after November 1, 2011 does not run with the title to the property, is not binding on or enforceable against any owner, subsequent owner, purchaser, or mortgagee, and is void and unenforceable. Nothing in the statute prohibiting transfer fee "shall imply" that a covenant recorded before November 1, 2011, is valid or enforceable.	Okla. Stat. Ann tit. 60, § 350 (2014)
OREGON	A declaration or covenant that requires a payment to a third-	Or. Rev. Stat. § 93.269

Jurisdiction	General Rule	Citation
	party upon a transfer of a fee simple interest in property is void and unenforceable.	(2014)
PENNSYLVANIA	<p>A private transfer fee obligation recorded or entered into on or after June 24, 2011 does not run with the real property's title and is not binding on or enforceable against a subsequent owner, purchaser, or mortgagee.</p> <p>A private transfer fee obligation recorded or entered into before June 24, 2011, is presumed valid and enforceable, provided it complies with all applicable laws, including the requirements for disclosure of the fee, and provided notice was recorded within six months of June 24, 2011.</p>	68 Pa. Cons. Stat. §§ 8102, 8106, 8107 (2014)
PUERTO RICO	No relevant provisions were located.	
RHODE ISLAND	<p>No person or business entity that sells real property may charge, collect, receive, or be entitled to a fee based solely on the property's subsequent resale or transfer. This prohibition includes fees a real estate developer imposes on the property's subsequent resale or transfer.</p> <p>Any covenant recorded on or after July 1, 2012, that violates the prohibition against transfer fees is void and unenforceable against any subsequent owner, purchaser, or mortgagee.</p>	R.I. Gen. Laws § 34-11-42 (2014)
SOUTH CAROLINA	<p>A transfer fee covenant recorded after February 1, 2012, or a lien that purports to secure the payment of a transfer fee, is not binding on or enforceable against the property or any subsequent owner, purchaser, or mortgagee.</p> <p>A transfer fee covenant recorded before February 1, 2012, will be valid and enforceable only if a separate document giving notice of the covenant was recorded no later than 180 days after February 1, 2012.</p>	S.C. Code § 27-1-70 (2014)
SOUTH DAKOTA	<p>A private transfer fee obligation recorded or entered into in South Dakota after June 30, 2011 does not run with the real property's title, is not binding on or enforceable against any subsequent owner, purchaser, or mortgagee, and is void and unenforceable.</p> <p>Private transfer fee obligations recorded or entered into in South Dakota before June 30, 2011 are not presumed valid and enforceable.</p>	S.D. Codified Laws § 43-4-49 (2014)
TENNESSEE	<p>A transfer fee covenant recorded after June 10, 2011, or any lien that purports to secure the payment of such a fee, is not binding on or enforceable against real property or any subsequent owner, purchaser, or mortgagee.</p> <p>The statutory prohibition does not imply that a covenant recorded prior to June 10, 2011 is valid or enforceable.</p>	Tenn. Code Ann. 66-37-104 (2014)

Jurisdiction	General Rule	Citation
TEXAS	<p>A private transfer fee obligation created on or after June 17, 2011, is void, and not binding or enforceable against a subsequent owner or purchaser of a real property interest.</p> <p>A transfer fee obligation created before June 17, 2011, is valid if the receiver of the fee filed for record a statutory "Notice of Private Transfer Fee Obligation" on or before January 31, 2012.</p>	Tex. Prop. Code §§ 5.202, .203 (2014)
UTAH	A transfer fee covenant recorded on or after March 16, 2010, is void and unenforceable.	Utah Code § 57-1-46 (2014)
VERMONT	No relevant provisions were located.	
VIRGIN ISLANDS	No relevant provisions were located.	
VIRGINIA	<p>A transfer fee covenant recorded on or after July 1, 2011 does not run with the title to the property, and is not binding on or enforceable against a subsequent owner, purchaser, or mortgagee.</p> <p>A lien purporting to secure the payment of a transfer fee pursuant to a transfer fee covenant recorded on or after July 1, 2011, is void and unenforceable.</p>	Va. Code § 55-70.2 (2014)
WASHINGTON	<p>A private transfer fee obligation recorded or entered into in Washington on or after April 13, 2011 is void and unenforceable, does not run with the property's title, and is not binding on or enforceable against any subsequent owner, purchaser, mortgagee, or holder of any interest.</p> <p>A private transfer fee obligation recorded or entered into before April 13, 2011, is not presumed valid and enforceable. Such an obligation will not be enforceable if notice of the obligation was not recorded before December 31, 2011.</p>	Wash. Rev. Code §§ 64.60.020, .040 (2014)
WEST VIRGINIA	No relevant provisions were located.	
WISCONSIN	No relevant provisions were located.	
WYOMING	A private transfer fee obligation recorded or entered into on or after April 1, 2012 does not run with the title to real property, and is not binding on or enforceable against any subsequent owner, purchaser or mortgagee of any interest in the property.	Wyo. Stat. § 34-28-102 (2014)