



# **PRIVATE TRANSFER FEES— POTENTIAL FOR TROUBLE, PROBLEMS FOR THE FUTURE?**

## ***A White Paper Report***

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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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## Preface

Private Transfer Fees (PTFs) are a new invention in the otherwise conservative and slow-moving world of real property law. Currently, PTFs are difficult for even a real property lawyer to describe, as it is not yet clear what they are in the eyes of the law. Conceptually, however, 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.

PTFs have rightly become of concern to REALTORS<sup>®</sup>, 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<sup>®</sup>. Even with such steps, continued close attention to the issue is necessary. The PTF is a fancy new dish, but Old Man Real Property Law is a meat-and-potatoes kind of guy. Litigation and a period of uncertainty about the legal enforceability of PTFs are almost certain to arise—and so are questions from real estate purchasers.

PTFs have only begun to show up on the radar of state policy makers. Where they have, current efforts have focused on disclosure requirements or partial limitations on their use. Like any new public policy concern, legislative attention will grow and become more aggressive as understanding of the concept increases. PTFs are complicated creatures and require a full attention span to grasp. It may take some time before legislatures understand the issues.

State legislatures may be able to tolerate some PTF flavors, but not others. Some PTFs are designed to benefit a real estate developer, its broker, and the company marketing the PTF business methodology. Others are intended to provide

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funding for conservation efforts or community-oriented facilities in a development. Some are purely charitable in nature and benefit a public interest like Hurricane Katrina relief.

If PTFs spread and continue to escape legislative prohibition, they will also continue to be controversial as their legal enforceability is challenged in the courts under common law principles. 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? 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 will 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 new, complicated, and controversial concept.

*Frank C. Aiello, Assistant Professor, Thomas M. Cooley Law School*

## ***Introduction***

*Private transfer fees* (PTFs), also sometimes referred to as *private transfer taxes*, are one of the hotly debated new issues in real estate law and practice. There seems to be little middle ground when it comes to opinions about PTFs—people either love them or hate them. 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, based on interviews with real estate experts and research to locate the most current laws and periodical discussions, will attempt to answer these questions and more, as well as raise a few new questions that it may be far too early to answer.



### ***What are PTFs?***

A PTF generally attaches to newly constructed property, often in a common-interest subdivision.<sup>1</sup> 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 ninety-nine years.<sup>2</sup> 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.”<sup>3</sup>

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<sup>1</sup> See *Private Transfer Fees* (California Association of REALTORS®) (Q&A format), Question 1, available at [http://www.socalmls.com/DispArticle.cfm?ARTICLE\\_ID=21905](http://www.socalmls.com/DispArticle.cfm?ARTICLE_ID=21905).

<sup>2</sup> Marjorie Ramseyer Bardwell & James Geoffrey Durham, *Transfer Fee Rights—Is the Lure of Sharing in Future Appreciation a Flawed Concept?*, *Probate & Property* (May/June 2007), at 25, available at <http://www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml>.

<sup>3</sup> See Kelly Quigley, *A New Buyer's Burden—An Emerging Type of Transfer Fee Can Add Thousands of Dollars to Closing Costs*, *REALTOR* (Sept. 1, 2007), available at <http://www.realtor.org/rmomag.NSF/pages/frontlinesledesep07>.

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Transfer fees generally run between 0.5 and 1.75 percent of the gross sales price of the property.<sup>4</sup> 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).<sup>5</sup> In some cases, the PTFs are marketed as a kind of private, money-making investment vehicle. In

### Business Method Patent?

The PTF concept was submitted for recognition to the U.S. Patent and Trademark office for a “business method patent” in 2006. Business method patents recognize and protect new and unique methods of doing business. The PTF patent has yet to be approved, but this timeline is not unusual. It is worth noting, however, that the idea of “business method patents” may be coming to an end. The U.S. Court of Appeals for the Federal Circuit, the exclusive forum for patent cases, hears oral argument on the controversial issue on May 8, 2008 (*In re Bilski*). Some speculate that this may bring an end to the concept. See Joe Palazzolo, Legal Times, *Fed. Cir. Set to Review Patent Eligibility*, Nat'l L.J., Mar. 3, 2008, at 15, col. 3.

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.<sup>6</sup> Such an initial exemption, while seemingly appealing, may actually serve to “camouflage” the PTF, so that the original buyer is

<sup>4</sup> See Steven Greenhut, *Opinion: A Stealth Tax on Homeowners*, Orange County Register (Mar. 11, 2007), available at [http://www.ocregister.com/ocregister/opinion/columns/article\\_1610764.php](http://www.ocregister.com/ocregister/opinion/columns/article_1610764.php); Daniel Miller, *Realtors Push Bill to Eliminate Developers' Transfer Tax Fees*, Los Angeles Business Journal (Mar. 26, 2007), available at [http://findarticles.com/p/articles/mi\\_m5072/is\\_13\\_29?pnun=2&opg=n24321464](http://findarticles.com/p/articles/mi_m5072/is_13_29?pnun=2&opg=n24321464).

<sup>5</sup> Ramseyer Bardwell & Durham, *supra* n.2, at 25, available at <http://www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml>.

<sup>6</sup> *Id.* at 26, available at <http://www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml>.



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caught off guard by the existence of the covenant when he or she attempts to sell the property.<sup>7</sup> 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 property, the seller is free to sell it to someone else free and clear of the covenant, which then ceases to exist.<sup>8</sup>

Even in states like California, where there has been much recent publicity about PTFs, confusion abounds. The idea is a new one, as a representative of the [Placer County Association of REALTORS®](#) observed, and there are a lot of questions about what PTFs are and how they work.<sup>9</sup> Builders' representatives may tell buyers that the fees are one-time community-benefit fees, the Placer County representative said, but often that is not actually the case. Even many California real estate professionals remain in the dark about PTFs, believing them to be a kind of a tax, she said.<sup>10</sup> 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. But if PTFs are here to stay, or even if they are here for the short term, it is essential that they be understood.

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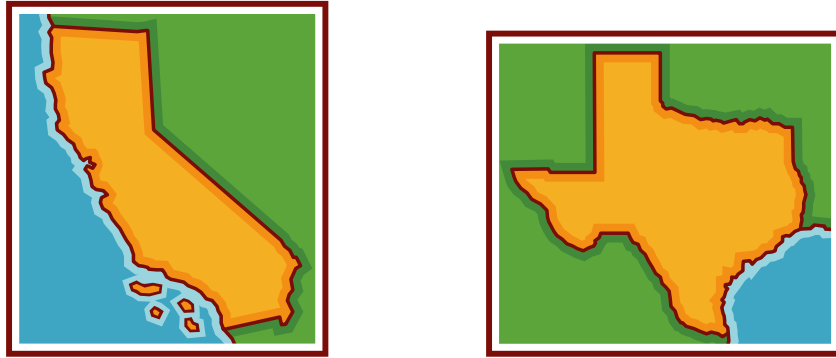
<sup>7</sup> *Id.*, available at <http://www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml>.

<sup>8</sup> *Id.* at 28, available at <http://www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml>.

<sup>9</sup> Name Withheld, Contract Government Affairs Representative, Telephone Interview (March 14, 2008).

<sup>10</sup> *Id.*

**Figure 1. States With New PTF Laws: California and Texas**



### ***The New PTF Laws—California and Texas***

Currently, PTFs are most commonly found in California, but they are beginning to crop up in other states as well.<sup>11</sup> Not surprisingly, then, California is just one of two states—the other being Texas—that have enacted legislation explicitly addressing private transfer fees in general real estate transactions. Both of these states passed the laws during their 2007 legislative sessions, demonstrating what a hot topic PTFs really are. California’s law—the only one of its kind—focuses on the disclosures that must be made relative to PTFs.<sup>12</sup> Note that forty-seven jurisdictions have *general* provisions that may require a real-estate licensee to disclose private transfer fees to a potential buyer, even if they apply only to future transactions. (See the Appendix for a table including the text of all jurisdictions’ general disclosure laws.) In thirty of these jurisdictions (Alaska,

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<sup>11</sup> Quigley, *supra* n.3, available at <http://www.realtor.org/rmomag.NSF/pages/frontlinesledesep07>.

<sup>12</sup> See Cal. Civ. Code §§ 1102.2, .3, .6e, .7, .10 (2007).

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Alabama, Colorado, District of Columbia, Delaware, Florida, Georgia, Iowa, Idaho, Illinois, Indiana, Kansas, Maine, Minnesota, Missouri, Nebraska, New Mexico, Nevada, New York, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Vermont, Washington, Wisconsin, and Wyoming), the duty to disclose is limited to adverse or material information that is *known* to the licensee; that is, the statute does not set forth an affirmative duty to seek out and uncover information. In sixteen jurisdictions, however (Arkansas, Arizona, Connecticut, Guam, Hawaii, Louisiana, Maryland, Montana, North Carolina, North Dakota, New Hampshire, New Jersey, Oklahoma, Pennsylvania, Puerto Rico,

Rhode Island, and the Virgin Islands), the duty to disclose, or the duty of honesty, relates generally to all information (without mention of the requirement that it be “known” to the licensee). Of those, four jurisdictions’ laws (Arizona, Connecticut, Montana, and Rhode Island) suggest an affirmative duty to obtain or ascertain relevant information.

The new California law requires, with some exceptions, that if property transferred on or after January 1, 2008, is subject to a transfer fee, the transferor must provide an additional disclosure statement setting forth specified information regarding the fees. (See sidebar.) Although no other jurisdiction has such a disclosure provision at

The disclosures must include:

- a notice that payment of a transfer fee is required upon transfer of the property;
- the fee amount required for the property's asking price;
- a description of how the fee is calculated;
- a notice that the final fee amount may differ if the fee is based on a percentage of the final sale price;
- the entity to which the fee will be paid;
- the purposes for which the funds will be used; and
- the date or circumstances, if any, under which the obligation to pay the transfer fee expires.

Cal. Civ. Code §§ 1102.2, .3, .6e, .7, .10 (2007). The law also provides specific recording requirements relating to PTFs. See Cal. Civ. Code § 1098.5 (2007).

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this time, Alaska law does require certain disclosures for similar fees in the narrow context of a rental agreement between a mobile-home park operator and a mobile-home park tenant.<sup>13</sup>

The California statute generally permits transfer fees that are imposed by a deed, contract, security instrument, or other transfer document.<sup>14</sup> The new Texas law, by contrast, *does not* permit PTFs, except under certain specified situations, such as when the fees are paid to the property owners' association that manages or regulates a subdivision, or to a charitable organization or governmental entity.<sup>15</sup> According to Craig Chick, Political Affairs Director for the [Texas Association of REALTORS®](#), the new law, which went into effect on January 1, 2008, prohibits the type of transfer fees that are pitched as an investment vehicle by private companies.<sup>16</sup> Chick predicts that next year the Texas legislature may entertain amendments to the new law that address both the homeowners' association and the charity exemptions. He would like to see a cap on the fees a homeowners' association may charge, he said, as well as an elimination of the charity exemption.<sup>17</sup> Chick also believes that the exemption for cities will be addressed in a later legislative session.

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<sup>13</sup> See [Alaska Stat. § 34.03.040\(c\)\(3\) \(2007\)](#).

<sup>14</sup> See [Cal. Civ. Code § 1098 \(2007\)](#).

<sup>15</sup> See [Tex. Prop. Code Ann. § 5.017 \(2007\)](#); see also [H.B. 2207, § 2, 80\(R\) Leg., Reg. Sess. \(2007\)](#).

<sup>16</sup> Craig Chick, Political Affairs Director, Texas Association of REALTORS®, Telephone Interview (March 19, 2008).

<sup>17</sup> *Id.*

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Lobbying efforts by the [California Association of REALTORS®](#) (CAR) to similarly limit the use of transfer fees in California proved unfruitful. Accordingly to Christopher Carlisle, a lobbyist for CAR, SB 760, the bill proposed by CAR, initially would have prohibited PTFs entirely.<sup>18</sup> (See sidebar.) When it became clear that the bill would receive little support, however, it was redrafted to provide restrictions—rather than an outright prohibition—on the fees. The redrafted SB 760 would have (1) limited the percentage of a home's price that could be charged as a PTF, (2) limited the number of years the covenant could continue in effect, and (3) required that the fee be used to benefit the homeowners being charged. Carlisle noted that some other proposals on the table called for PTFs to be paid in perpetuity, or that they be used to fund charitable trusts for beneficial projects, such as Hurricane Katrina relief, that would not

The recording requirements are as follows:

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.

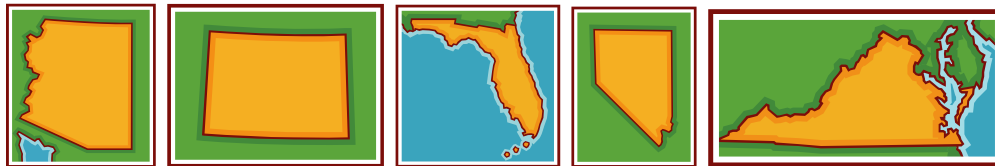
See [Cal. Civ. Code § 1098.5 \(2007\)](#).

<sup>18</sup> Christopher Carlisle, California Association of REALTORS®, Telephone Interview (March 18, 2008).

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directly benefit the homeowners paying the fees.<sup>19</sup> Even the redrafted bill, however, met with little support, and ultimately AB 980, the disclosure law, was enacted.<sup>20</sup> Accordingly to Carlisle, although it does not go as far as CAR had originally hoped, the law that passed will still be helpful, in that it will let buyers know what to expect; previously, not all builders had been particularly forthcoming about PTFs, he said.<sup>21</sup> Carlisle also pointed out the recording requirements of the law as enacted, observing that if the requisite documents are not timely recorded, the fees may not be charged.

**Figure 2. Other States With PTF Action:  
Arizona, Colorado, Florida, Nevada, and Virginia**



### ***What's Happening in Other States?***

Although the laws of other states are silent as to whether PTFs are permitted or prohibited, commentators have noted planned or existing private transfer fees in several other states. Recent reports indicated that Lennar intends to expand its PTF program into its homebuilding projects in Nevada and Arizona, for example, and a planned community in Prince William, Virginia, has amended its bylaws to include a \$500 private

<sup>19</sup> *Id.*

<sup>20</sup> The California legislature's website includes analyses of both bills. See <http://www.legislature.ca.gov/>.

<sup>21</sup> Christopher Carlisle, *supra* n.18.

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transfer fee.<sup>22</sup> In other words, just because a state has no PTF law does *not* mean it has no PTFs.

There may also be relevant local limitations, such as at the county or municipal level. Summit County, Colorado, for instance, permits a private transfer fee that is related to (and offsets) the payment of the “impact fee” required of all developers in the county. (See sidebar.) In addition, because these fees are such a recent phenomenon, potential laws may still be at the legislative stage

and not yet enacted. As one example, bills pending in the Florida legislature that would prohibit PTFs in that state appear to be facing little opposition, and are readily making their way through committees.<sup>23</sup>

The Summit County Board of County Commissioners, "Housing Allowance Restrictive Covenant" form (2008), provides:

D. The Summit County Board of County Commissioners has adopted a policy in the administration and collection of said Impact Fee, which allows individuals who upon their own volition seek the immediate benefit of avoiding the imposition of Impact Fee at the time of building permit issuance, to do so by voluntarily imposing a private transfer fee upon the subsequent sale of the relevant property subject to said Impact Fee.

E. Said private transfer fee, referred to on a countywide basis as the Voluntary Workforce Housing Availability and Sustainability Endowment, has been legislatively determined by the Board of County Commissioners of Summit County, Colorado, to be an acceptable mitigation to the effects of allowing a developer the benefits of circumventing the imposition of the Impact Fee.

<sup>22</sup> See Jeff Collins, *Lennar's Charitable Fund Raising Opposed*, Orange County Register (May 14, 2007), available at [http://www.ocregister.com/ocregister/money/article\\_1694371.php](http://www.ocregister.com/ocregister/money/article_1694371.php); Carolyn Schwaar, *Know Your Issues: 10 Issues Every Association and Member Should Understand*, NAR Library (Summer 2007), available at <http://www.realtor.org/eomag.nsf/6e6a36d69054b160852565230049bbc4/72d0ebd6fe2696f98625733e006ca30c?OpenDocument>.

<sup>23</sup> There are two Florida bills, one in the Senate (SB 464, at [http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&BI\\_Mode=ViewBillInfo&BillNum=0464](http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&BI_Mode=ViewBillInfo&BillNum=0464)) and one in the House (HB 391 at [http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&BI\\_Mode=ViewBillInfo&BillNum=0391](http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&BI_Mode=ViewBillInfo&BillNum=0391)). The Senate bill seems to be moving ahead more quickly.

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PTF-related laws may also 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 thirty years, which would also apply to PTFs.<sup>24</sup> 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 tenant to pay a transfer fee.<sup>25</sup> 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."<sup>26</sup>

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.

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<sup>24</sup> [Minn. Stat. § 500.20 \(2007\)](#).

<sup>25</sup> [Alaska Stat. § 34.03.040\(c\)\(3\) \(2007\)](#).

<sup>26</sup> 68 Pa. Stat. Ann. §§ 3302 (a)(12), 4302(a)(12), 5302(a)(12) (West 2007) (not available online except through fee-based services).





## **What are Some Potential Problems with PTFs?**

### **Practical and short-term implications**

- *Impact on home sales*



PTFs can present problems with regard to both their immediate practical application and their long-term enforcement and effectiveness. One problem that could have *both* short- and long-term consequences relates to PTFs' potential impact on real-estate sales. REALTORS<sup>®</sup> worry that PTFs could increase the cost of homes or, upon their discovery, result in the cancellation of purchase agreements.<sup>27</sup> But whether this proves to be a legitimate concern is as yet uncertain.

A representative of [Lennar Builders](#) says that Lennar has been imposing transfer fees for about five years, and has 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.<sup>28</sup> In those cases where there was a problem, he said, it disappeared once the fees were fully explained to the buyers.<sup>29</sup> “The amount of the fee is relatively small,” the Lennar official opines, and he is aware of no case in which someone refused to purchase a home simply because of a PTF.<sup>30</sup>

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<sup>27</sup> *Private Transfer Fees* (California Association of REALTORS<sup>®</sup>) (Q&A format), Question 2, available at [http://www.socalmls.com/DispArticle.cfm?ARTICLE\\_ID=21905](http://www.socalmls.com/DispArticle.cfm?ARTICLE_ID=21905).

<sup>28</sup> Name Withheld, Lennar Builders, Telephone Interview (March 21, 2008).

<sup>29</sup> *Id.*

<sup>30</sup> A recent news report also 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.”<sup>30</sup> Lennar fully discloses

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It is possible, however, as the fees are a relatively recent phenomenon, their impact will not be felt until homes are *re*-sold with the fees in place.

- *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.<sup>31</sup>

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.<sup>32</sup> 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.<sup>33</sup> Still, they result in a restriction on the deed. Once Fannie Mae and Freddy Mac became aware of the fact that some private entities were promoting the fees as an investment vehicle, but not necessarily explaining them to

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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 Greenhut, *supra* n.4, available at [http://www.ocreger.com/ocreger/opinion/columns/article\\_1610764.php](http://www.ocreger.com/ocreger/opinion/columns/article_1610764.php).

<sup>31</sup> Ramseyer Bardwell & Durham, *supra* n.2, at 28, available at <http://www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml>.

<sup>32</sup> *Id.*, available at <http://www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml>.

<sup>33</sup> Name Withheld, Senior Underwriting Counsel, Telephone Interview (March 24, 2008).

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unwary buyers, the lenders refused to make loans for property to which the covenants attached because of the resulting deed restrictions.<sup>34</sup>

From the title company's own perspective, the 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.<sup>35</sup> The potential for breach-of-contract litigation, however, may be of greater concern to all of the parties involved in the transaction.

### ***Long-term concerns: Impediments to legal enforcement***



- *Failure to disclose/fraud*

In addition to the potential long-term impact on home sales, many in the industry anticipate litigation over PTFs. In addition to 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,<sup>36</sup> Chair of the [American Bar Association Real Property Section's Committee on Easements, Restrictions, and Covenants](#),

### **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.

<sup>34</sup> Research into Fannie Mae and Freddy Mac's policies, practices, and public statements did not provide independent verification of this observation as of this Report's date.

<sup>35</sup> Senior Underwriting Counsel, *supra* n.33.

<sup>36</sup> Mr. Kolodner is a partner at the Philadelphia, Pennsylvania law firm of Kleinbard Bell & Brecker LLP.

## Private Transfer Fees—Potential For Trouble, Problems for The Future?

recognizes the potential for lawsuits over the fees based on fraud and non-disclosure, particularly when there is substantial money at stake.<sup>37</sup>



- *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.<sup>38</sup> 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.<sup>39</sup> 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.

### 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.

<sup>37</sup> Bernard Kolodner, Esq., Partner, Kleinbard Bell & Brecker LLP, Telephone Interview (March 17, 2008).

<sup>38</sup> Ramseyer Bardwell & Durham, *supra* n.2, at 28, available at <http://www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml>.

<sup>39</sup> *Id.* at 28, available at <http://www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml> (citing *Johnson v. Whiton*, 34 N.E.542, 542 (Mass. 1893)).

## Private Transfer Fees—Potential For Trouble, Problems for The Future?



- *Restraints on alienability*

One of the major legal tenets of property ownership is the ability to freely convey the subject property to others.<sup>40</sup> PTFs could be viewed as an impermissible restraint on the alienation of property, and restraints that infringe on that ability are often deemed invalid.<sup>41</sup> A court could refuse to enforce a PTF covenant on this basis alone.



- *“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 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,”<sup>42</sup> 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.”<sup>43</sup> An

<sup>40</sup> *Id.*, available at <http://www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml>. This concept is embodied in the Restatement (Third) of Property, a recognized authority on property law.

<sup>41</sup> Ramseyer Bardwell & Durham, *supra* n.2, at 28, available at <http://www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml>. 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.)

<sup>42</sup> Black's Law Dictionary (8th ed. 2004).

<sup>43</sup> See Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/servitude>.

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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

### A PTF May Not Be “Touchy-Feely” Enough

Did you ever want to go to law school? If so, read on with relish. Otherwise, read on with a large cup of coffee in hand—and if you are still interested afterward, consider taking the Law School Admissions Test!

PTF advocates will likely 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. They are thus an enforceable “real covenant” or “equitable servitude.” While the requirements for both types of servitudes are technical and slightly different, each requires that the CCR “touch and concern the land.” In addition, although a third party generally is not bound by a contract in which it was never involved, real property law *does* allow us to magically bind subsequent owners of property to a promise in which they were not involved if certain technical requirements are met. For a CCR to bind subsequent owners who were not party to the original agreement, the CCR must “touch and concern the land.”

Just what meets the “touch and concern” requirement is difficult to describe, and it is one of the few situations where Assistant Professor Aiello tells his students that “you know it when you see it.” 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., Cullett v. Stanley Stilwell & Sons, Inc.*, 170 A.2d 52 (N.J. Super. Ct. App. Div. 1961).

The materials of a private company that markets PTFs as a patentable business method contend that a PTF does “touch and concern” the land, as it allows a land developer to spread the cost of development across subsequent owners, instead of the initial buyer. It is doubtful that a developer will be able to substantiate this claim through evidence that the initial sale price of property subject to a PTF is less than that without a PTF. In any event, providing financing for the developer is unlikely to be found to relate to the land in a way that meets the “touch and concern” requirement. In contrast, a PTF that benefits land conservation on or near the property, or provides for capital improvements that service the property, will easily meet the “touch and concern” requirement.

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.<sup>44</sup> (See sidebar.)

<sup>44</sup> Ramseyer Bardwell & Durham, *supra* n.2, at 29, available at <http://www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml>. The touch-and-concern doctrine originated in *Spencer’s Case*, 5 Co. Rep. 16a, 77 Eng. Rep. 72 (1583), in which the

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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.<sup>45</sup> 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.<sup>46</sup>

Curt Sproul,<sup>47</sup> Co-chair of the [State Bar of California Real Property Section's Common Interest Development Subsection](#), agrees that, in California, a covenant that runs with the land must touch and concern that land. In his opinion, however, PTFs do in fact touch and concern the land, and he cites this characteristic as one of their positive attributes.<sup>48</sup> “[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 explains. Rather, “[a] covenant . . . that is imposed to

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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.

<sup>45</sup> Boyer, *The Law of Property: An Introductory Survey* 321 (4th ed. 1991).

<sup>46</sup> Ramseyer Bardwell & Durham, *supra* n.2, at 29, available at <http://www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml>. 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.”

<sup>47</sup> Mr. Sproul is a principal in the Roseville, California, firm of Sproul Troust LLP, and has written and published on subjects relating to PTFs.

<sup>48</sup> Curt Sproul, Esq., Principal, Sproul Troust LLP, E-mail Correspondence (March 16, 2008).

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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’) on the use and enjoyment of lands burdened by the covenant that are in the immediate region where the new communities are being developed.”<sup>49</sup>

Scott Jackson, an Irvine, California, attorney who represents the [Lennar Charitable Trust](#) (associated with the homebuilder of the same name), points out the difference between investment-vehicle PTFs and those designed to benefit the community.<sup>50</sup> Jackson does 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 states, 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.<sup>51</sup>

- *Taxation*



Many observers—even those integrally involved with PTFs—often call the fees private transfer *taxes*.<sup>52</sup> The [California Association of REALTORS®](#), an outspoken

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<sup>49</sup> *Id.*

<sup>50</sup> F. Scott Jackson, Esq., Shareholder, Jackson DeMarco Tidus Peckenpaugh, a Law Corporation, Telephone Interview (March 25, 2008).

<sup>51</sup> *Id.*

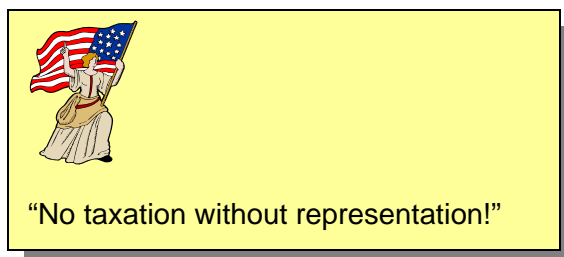
<sup>52</sup> See, e.g., Miller, *supra* n.4 (stating that “private transfer **taxes** . . . **tax** the transfer of property”; that “[i]t is unclear exactly when the **tax** was first used by developers”; that “private transfer **taxes** are used for things like community projects and habitat preservation”; that “the **tax** is not regulated”; and that “a Lake Tahoe-area development charges a 1.75 percent transfer **tax**”) (emphasis added), available at [http://findarticles.com/p/articles/mi\\_m5072/is\\_13\\_29?num=2&opg=n24321464](http://findarticles.com/p/articles/mi_m5072/is_13_29?num=2&opg=n24321464). See also Quigley, *supra* n.3 (interchangeably using “private transfer fee” and “private transfer tax”), available at



## Private Transfer Fees—Potential For Trouble, Problems for The Future?

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opponent of PTFs and sponsor of legislation to prohibit or restrict them, has consistently referred to the fees in this manner.<sup>53</sup> Although some assert that PTFs are *not* taxes, because they are not imposed by governmental entities,<sup>54</sup> 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 most basic founding principles. PTFs that are the subject of legislation, like that recently passed in California, may hold truer to these principles. But bear in mind that the fees—

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<http://www.realtor.org/rmomag.NSF/pages/frontlinesledesep07>; Greenhut, *supra* n.4, available at [http://www.ocreger.com/ocreger/opinion/columns/article\\_1610764.php](http://www.ocreger.com/ocreger/opinion/columns/article_1610764.php).

<sup>53</sup> 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/blogsvieiw/58476/Private-Transfer-Fee-Alert>.

<sup>54</sup> 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](http://realtytimes.com/rtpages/20070622_privatetaxes.htm).

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or taxes, as it were—existed before the legislation did, and that only two states have enacted laws on this subject to date, 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. The local law provides that the fees must go to a benevolent trust or specifically provide for affordable housing in the community. Although the money is collected because of a public ordinance, she says, there is no public control over how the money is used. “There 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.’”<sup>55</sup>

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.

- *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 *trust-and-estate* law than *real-estate* law, the Rule is a codification of the common-law

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<sup>55</sup> Name Withheld, Senior Underwriting Counsel, Telephone Interview (March 24, 2008).

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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 twenty-one years after the end of any "life in being" at the time the agreement is made.<sup>56</sup> As applied in the present context, a PTF covenant of unlimited duration arguably ties up title to the subject property for more than twenty-one 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.<sup>57</sup>

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<sup>56</sup> See, e.g., *The 'Lectric Law Library's Lexicon on \*Perpetuities, Rule Against\**, available at <http://www.lectlaw.com/def2/p033.htm>. See also 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=>.

<sup>57</sup> Be forewarned that 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 . . . ."

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Thus, although there are already a variety of potential legal impediments to the enforcement of PTFs, most of the potential challenges are untested.<sup>58</sup> Scott Jackson, the California attorney who represents the [Lennar Charitable Trust](#), knows of only one Arizona case involving PTFs. The developer in that case 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

### Why Not Forever?

A principle espoused by Grumpy Old Man Property Law is the "Rule Against Perpetuities." The English land-owning class, through complicated conveyancing arrangements, attempted to prevent the transfer of their property outside of their family in the future. The law answered these complicated schemes with the Rule Against Perpetuities, an equally complicated rule that forwards a simple concept: no restriction on the ability to transfer a property interest should exist indefinitely. As an apparent preemption to a challenge based on the Rule Against Perpetuities, most PTFs seem to be limited to 99 years or less.

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.<sup>59</sup>



### ***Are There Any Potential Benefits to PTFs?***

Although many in the real-estate industry take issue with PTFs, many builders and developers 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,

<sup>58</sup> An online search conducted in April 2008 for reported cases involving "private transfer fees" or "private transfer taxes" retrieved no results.

<sup>59</sup> F. Scott Jackson, Esq., *supra* n.50.

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such as satisfying environmentalist groups' demands that they preserve a certain amount of open space when planning a new housing development.<sup>60</sup>

*Are PTFs a “win-win” proposition?*

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.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> 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 and other benefits without raising taxes.<sup>64</sup> Others may object, however, as the PTF may allow a development to proceed that otherwise would not have occurred.

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<sup>60</sup> Quigley, *supra* n.3, available at <http://www.realtor.org/rmomag.NSF/pages/frontlinesledesep07>.

<sup>61</sup> *Id.*, available at <http://www.realtor.org/rmomag.NSF/pages/frontlinesledesep07>.

<sup>62</sup> *Id.*, available at <http://www.realtor.org/rmomag.NSF/pages/frontlinesledesep07>.

<sup>63</sup> The Sierra Club, for example, supported the recent California legislation favoring PTFs. See Hunt, *Legislative Support for Private Transfer Taxes*, Realty Times (June 22, 2007), available at [http://realtytimes.com/rtpages/20070622\\_privatetaxes.htm](http://realtytimes.com/rtpages/20070622_privatetaxes.htm).

<sup>64</sup> Name Withheld, Contract Government Affairs Representative, Telephone Interview (March 14, 2008).

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*The new Texas legislation was directly targeted at shutting down PTFs as investment vehicles.*

[Freehold Licensing, Ltd.](#), a privately held company that acts as the licensor in PTF transactions, defends the fees as well, arguing that they are an increasingly important source of funding for green space, environmental initiatives, and “other worthy causes.”<sup>65</sup> Freehold is not without its critics, however. In fact, Craig Chick, Texas Association of REALTORS<sup>®</sup> Political Affairs Director, noted that the new Texas legislation was directly targeted at shutting down PTFs as investment vehicles, such as those promoted by companies like Freehold.<sup>66</sup>

On a more supportive note, Curt Sproul, Co-chair of the [Common Interest Development Subsection of the California Bar’s Real Property Section](#), notes 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.<sup>67</sup> This trend means that PTFs should not impose a serious impediment to home ownership. Moreover, Sproul observes, 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

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<sup>65</sup> See Press Release, *Transfer Fee Bill Passes Texas Legislature* (May 28, 2007), available at [http://www.freeholdlicensing.com/pr\\_Tex5.017.html](http://www.freeholdlicensing.com/pr_Tex5.017.html). More information about Freehold Licensing is available at <http://www.freeholdlicensing.com/>. Representatives of Freehold Licensing failed to respond to multiple requests for interviews.

<sup>66</sup> Craig Chick, *supra* n.16.

<sup>67</sup> Curt Sproul, Esq., *supra* n.48.

## Private Transfer Fees—Potential For Trouble, Problems for The Future?

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.”<sup>68</sup>

In addition, Sproul notes, in states such as Colorado, transfer fees in common-interest developments can 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.<sup>69</sup>

*PTFs should benefit “a tax exempt 501(c)(3) or 501(c)(4) organization” and have “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.”*

*Curt Sproul, Esq.*

While acknowledging these arguments, the real estate industry also identifies pitfalls in the developers’ 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

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

## Private Transfer Fees—Potential For Trouble, Problems for The Future?

uses to which the funds can be put.<sup>70</sup> 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, acknowledges 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."<sup>71</sup> Sproul further asserts that the recipient organization should be independent from the project developer who imposed the fee.<sup>72</sup>



### ***Is There a Middle Ground?***

There are clearly arguments on both sides of the PTF fence. It is quite possible that a compromise will 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 the PTFs. But it is not clear at this point whether the fees will create more problems than they solve, or even whether they are here to stay. One thing that appears fairly certain is that PTFs that are designed strictly as investment vehicles will face strong opposition.

<sup>70</sup> See Quigley, *supra* n.3, available at <http://www.realtor.org/rmomag.NSF/pages/frontlinesledesep07>.

<sup>71</sup> Curtis Sproul, Esq., *supra* n.48.

<sup>72</sup> *Id.*



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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. Scott Jackson, the California attorney for the Lennar Charitable Trust, does not think that there will 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 observes, and when developers are not able to foot the bills themselves, PTFs may provide a source of revenue.<sup>73</sup>

In California, at least, PTFs appear to be a growing trend, according to Vanessa Lugo, aide to [California Assemblymember Charles Calderon](#), sponsor of the bill that eventually became the new California law.<sup>74</sup> Because the law is new, Lugo says, it has not had much impact yet. She predicts there will be little impact for the next year or so.<sup>75</sup>

A Lennar representative, by contrast, observes that PTFs have 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 have been no takers. “When times are good, everyone’s too busy,” Lennar’s representative explains, “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.”<sup>76</sup>

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<sup>73</sup> F. Scott Jackson, Esq., *supra* n.50.

<sup>74</sup> The California legislature’s website includes an analysis of AB 980, which became the new disclosure law. See <http://www.legislature.ca.gov/>.

<sup>75</sup> Vanessa Lugo, Legislative Aide to Assemblymember Calderon, Telephone Interview (April 8, 2008).

<sup>76</sup> Name Withheld, Lennar Builders, Telephone Interview (March 21, 2008).

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The Lennar spokesman said that the new California law will not hurt Lennar's program, and that it may actually help it. Lennar has always worked to ensure that buyers understood its PTF program, and their disclosures even went beyond what the California law now requires. Lennar "go[es] to great pains to make sure the program is understood," and contrary to the real-estate industry's objections, he states, builders are not enriching themselves via PTFs—at least not Lennar. "The program actually costs Lennar money, but it has been well received."<sup>77</sup>



### **Conclusion**

No matter whether they proliferate or fade away, one thing is certain: real estate professionals need to be ready to meet PTFs head on if and when they do arise. Even if PTFs escape legislative prohibition, they are likely to be legally controversial until the courts have determined if, and where, they fit into the traditional real property landscape. The following steps can help ensure that readiness and help prepare for the future.

- Familiarize yourself with what private transfer fees are and how they work. There is plenty of recent Internet activity on the subject, including on REALTOR® websites and in real-estate blogs. (See the Bibliography for some starting points.)
- Determine whether your local or state jurisdiction has a PTF law that limits their application, requires certain disclosures, or includes other restrictions or requirements on their use.

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<sup>77</sup> *Id.*

## Private Transfer Fees—Potential For Trouble, Problems for The Future?

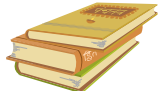
- Consider both the very broad laws applicable to real-estate licensees in general, which may have particular import where PTFs are concerned, and very specific laws that may relate to PTFs in only certain, strictly limited contexts.
- Determine whether each sale in which you are involved includes property 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.
- 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 real estate professionals will most likely have to deal with them—and forewarned is forearmed! This White Paper provides a strong foundation for industry insiders to stand on as they face PTFs in future transactions and compliance issues following legislative and regulatory action.

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### Bibliography



For more information about private transfer fees, please refer to the following articles and discussions.

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- John Chipman Gray, *The Rule Against Perpetuities* (Lawbook Exch. 2003).
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- *Private Transfer Fees* (California Association of REALTORS®), available at [http://www.socalmls.com/DispArticle.cfm?ARTICLE\\_ID=21905](http://www.socalmls.com/DispArticle.cfm?ARTICLE_ID=21905).
- Kelly Quigley, *A New Buyer's Burden—An Emerging Type of Transfer Fee Can Add Thousands of Dollars to Closing Costs*, REALTOR (Sept. 1, 2007), available at <http://www.realtor.org/rmomag.NSF/pages/frontlinesledesep07>.
- Carolyn Schwaar, *Know Your Issues: 10 Issues Every Association and Member Should Understand*, NAR Library (Summer 2007) (noting that a planned community in Prince William, Virginia, has amended its bylaws to include a \$500 private transfer fee), available at <http://www.realtor.org/eomag.nsf/6e6a36d69054b160852565230049bbc4/72d0e6bd6fe2696f98625733e006ca30c?OpenDocument>.
- 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>.

## APPENDIX

### General Disclosure Laws

The majority of states and other U.S. jurisdictions currently have general provisions that may require disclosure of PTFs to possible buyers. The following table summarizes those provisions and provides links to relevant state-level legislative and regulatory provisions where available.

Jurisdiction	General Requirements	Citation
ALABAMA	<p>A licensee has the following obligations, among others, to all parties to a real estate transaction:</p> <ul style="list-style-type: none"> <li>to provide brokerage services honestly and in good faith; and</li> <li>to disclose all known information that is not confidential, that is material to the transaction, and that is not reasonably discoverable by the client. However, the licensee has no affirmative duty to discover that information.</li> </ul>	<a href="#">Ala. Code §§ 34-27-84(a), -85(a) (2006)</a>
ALASKA	<p>A real estate licensee owes the following duties, among others, to each person to whom the licensee provides specific assistance:</p> <ul style="list-style-type: none"> <li>to deal with honesty and in good faith;</li> <li>except as otherwise provided, to disclose all known material information regarding the real estate's physical condition if it substantially adversely affects the real estate or a person's ability to perform his or her obligations in the transaction or if the information would "materially impair or defeat" the transaction's purpose; and</li> <li>not to take actions which are adverse or detrimental to the represented person's interests.</li> </ul> <p>A licensee has no duty to investigate any matter that he or she has not agreed to investigate, or that is not known by the seller, prospective buyer, or licensee.</p>	<a href="#">Alaska Stat. §§ 08.88.615, .620 (2007)</a>
ARIZONA	<p>A licensee owes a fiduciary duty to his or her client and must, among other things,</p> <ul style="list-style-type: none"> <li>deal fairly with all parties;</li> <li>disclose in writing to all other parties any adverse information that materially affects the consideration to be paid, including information that any party is or may be unable to perform, any material property defect, and the possible existence of a lien or encumbrance; and</li> </ul>	<a href="#">Ariz. Admin. Code R4-28-1101 (Supp. 2005)</a>

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Jurisdiction	General Requirements	Citation
	<ul style="list-style-type: none"> <li>exercise reasonable care in ensuring that information material to a client's interests and relevant to the contemplated transaction is obtained and accurately communicated to the client.</li> </ul>	
ARKANSAS	A licensee acting as an agent must protect and promote his or her client's interests, while dealing honestly with all parties.	<a href="#">Ark. Real Estate Comm'n Regs. r. 8.5 (2007)</a>
COLORADO	<p>a buyer's agent has the following duties, among others:</p> <ul style="list-style-type: none"> <li>to disclose to the buyer known adverse material facts; and</li> <li>to counsel the buyer as to any known material benefits or risks of a transaction.</li> </ul> <p>A seller's agent owes no duty or obligation to the buyer or tenant, except that a broker must generally disclose all known adverse material facts.</p>	<a href="#">Colo. Rev. Stat. Ann. §§ 12-61-804, -805 (2007)</a>
CONNECTICUT	A licensee may not misrepresent or conceal any material facts. Also, a broker must exercise diligence at all times in obtaining and presenting accurate information in the broker's advertising and representations to the public.	Conn. Agencies Regs. § 20-328-5a (West 2008)
DELAWARE	<p>A broker owner, broker of record, brokerage organization, and licensee have the following obligations and responsibilities, among others, "to the extent applicable to their functions":</p> <ul style="list-style-type: none"> <li>to disclose to all prospective buyers any known adverse material facts, among others things;</li> <li>to provide customers with factual information they request; and</li> <li>to provide clients with relevant factual information.</li> </ul> <p>Also, a brokerage organization, broker owner, broker of record, or licensee is not liable for a client's "wrongful act, error, omission, or misrepresentation," except to the extent he or she had actual knowledge of the wrongful act, error, omission, or misrepresentation. This provision does not apply if the licensee or brokerage organization is hired as a common law agent.</p>	<a href="#">Del. Code Ann. tit. 24, §§ 2973, 2977 (2007)</a>
DISTRICT OF COLUMBIA	A licensee engaged by a buyer must disclose to the buyer known material facts related to the property or the transaction. Also, a seller's licensee must treat prospective buyers honestly and not knowingly give false information.	D.C. Code Ann. § 42-1703(a)(2), (b)(1)(B)(iii) (2007)
FLORIDA	<p>A single agent has the following duties, among others:</p> <ul style="list-style-type: none"> <li>honest and fair dealing;</li> <li>full disclosure; and</li> <li>disclosure of "all known facts that materially affect the value of residential real property and are not readily observable."</li> </ul>	<a href="#">Fla. Stat. Ann. § 475.278 (2007)</a>

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Jurisdiction	General Requirements	Citation
	<p>A transaction broker and a licensee who has no brokerage relationship with a party owes the following duties, among others, to a potential seller or buyer:</p> <ul style="list-style-type: none"> <li>• honest and fair dealing; and</li> <li>• disclosure of “all known facts that materially affect the value of the residential real property” that are not readily observable.</li> </ul> <p>The above disclosure requirements apply to all residential sales, which include</p> <ul style="list-style-type: none"> <li>• the sale of improved residential property of four or fewer units;</li> <li>• the sale of unimproved residential property intended for four or fewer units; or</li> <li>• the sale of agricultural property of 10 acres or fewer.</li> </ul> <p>The disclosure requirements do not apply</p> <ul style="list-style-type: none"> <li>• when a licensee knows that the potential seller or buyer is represented by a single agent or a transaction broker;</li> <li>• when "an owner is selling new residential units built by the owner and the circumstances or setting should reasonably inform the potential buyer that the owner's employee or single agent is acting" on the owner's behalf; or</li> <li>• to specified transactions, including, among others, the following: <ul style="list-style-type: none"> <li>• the rental or leasing of certain real property;</li> <li>• a bona fide open house or model home showing that does not involve eliciting confidential information, executing an offer or representation agreement, or negotiating price, terms, or conditions;</li> <li>• "unanticipated casual conversations" that do not involve eliciting confidential information, executing an offer or representation agreement, or negotiating price, terms, or conditions; and</li> <li>• responding to general factual questions.</li> </ul> </li> </ul>	
GEORGIA	<p>A buyer's broker must disclose to the buyer known adverse material facts concerning the transaction.</p> <p>Although a seller's broker must timely disclose to all parties with whom the broker is working all adverse material facts pertaining to the property's physical condition that the broker knows and that the buyer could not discover in a reasonably diligent inspection, Georgia law does not explicitly address a seller's duties regarding the</p>	Ga. Code Ann. §§ 10-6A-5, -7 (LexisNexis 2007)



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Jurisdiction	General Requirements	Citation
	disclosure to buyers of other factors.	
GUAM	A licensee must protect the public against “fraud, misrepresentation, or unethical practices in the real estate field.”	<a href="#">Guam Code Ann. tit. 21, § 104302 (2007)</a>
HAWAII	A licensee must protect the public against “fraud, misrepresentation, or unethical practices in the real estate field.”	<a href="#">Haw. Admin. R. § 16-99-3 (2007)</a>
IDAHO	<p>A licensee owes the following duties, among others, to a client:</p> <ul style="list-style-type: none"> <li>• to promote the client’s best interests in good faith, honesty, and fair dealing; and</li> <li>• to disclose to the client all adverse material facts that the licensee knows or reasonably should have known.</li> </ul> <p>Similarly, if a buyer or seller is not represented by a brokerage, the party remains a customer, and the brokerage and its licensees are nonagents that owe the following legal duties, among others:</p> <ul style="list-style-type: none"> <li>• to perform with honesty, good faith, and reasonable skill and care; and</li> <li>• to disclose to the buyer and seller all adverse material facts that the licensee knows or reasonably should have known.</li> </ul> <p>However, unless otherwise agreed in writing, a brokerage and its licensees owe no duty to a client or a buyer customer to verify the accuracy or completeness of a statement or representation regarding a property.</p>	<a href="#">Idaho Code §§ 54-2086, -2087 (2007)</a>
ILLINOIS	A licensee representing a client must disclose to the client known material facts, unless confidential. Also, a licensee must treat all customers honestly and may not negligently or knowingly give a customer false information.	<a href="#">225 Ill. Comp. Stat. Ann. 454/15-15(a)(2)(C), -25(a) (2007)</a>
INDIANA	<p>A buyer’s licensee must disclose to the buyer known adverse material facts or risks concerning the transaction.</p> <p>A seller’s licensee owes no duties to the buyer, except that the licensee must</p> <ul style="list-style-type: none"> <li>• treat all prospective buyers honestly;</li> <li>• not knowingly give buyers false information; and</li> <li>• disclose to a prospective buyer known adverse material facts concerning the property’s physical condition and facts that the law requires to be disclosed and that the buyer could not discover inspecting the property.</li> </ul> <p>A seller’s licensee need not verify the accuracy of any written or oral statement by the seller.</p>	<a href="#">Ind. Code Ann. §§ 25-34.1-10-10(a), -11 (2007)</a>
IOWA	When providing brokerage services to a party, a licensee must, among other things,	<a href="#">Iowa Admin. Code r. 193E-12.3, -12.4 (2007)</a>

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Jurisdiction	General Requirements	Citation
	<ul style="list-style-type: none"> <li>• act honestly and in good faith; and</li> <li>• unless excepted by statute,</li> <li>• generally disclose to each party all known material adverse facts.</li> </ul> <p>Similarly, a licensee providing brokerage services to a client must disclose to the client all known material information.</p> <p>Also, a licensee representing a buyer as an exclusive agent must</p> <ul style="list-style-type: none"> <li>• disclose material adverse facts; and</li> <li>• provide services to all parties honestly and in good faith.</li> </ul> <p>A licensee representing a seller as an exclusive agent must provide services to all parties honestly and in good faith.</p>	
KANSAS	<p>A licensee must give a prospective buyer or seller at the first practical opportunity a brochure entitled "Real estate brokerage relationships," which must include a statement containing the following, among other things: "Even though licensees may be representing other parties, they are obligated to treat you honestly, give you accurate information, and disclose all known adverse material facts."</p> <p>A buyer's agent must disclose to the buyer all known adverse material facts. A seller's agent must also disclose to the buyer all known adverse material facts. Also, a seller's or a landlord's agent owes no duty to a customer, except that the licensee must generally disclose to a customer all known adverse material facts actually known by the licensee (except certain information regarding the property's physical condition contained in a written report regarding the property's physical condition that was provided to the client or customer).</p>	<a href="#">Kan. Stat. Ann §§ 58-30,106; -30,107 (2007); Kan. Admin. Regs. 86-3-26 (2006)</a>
LOUISIANA	<p>A licensee must treat all customers honestly and fairly.</p>	<a href="#">La. Rev. Stat. Ann. § 9:38994(A) (2007)</a>
MAINE	<p>A seller's agent, in his or her relationship with the buyer, must, among other things,</p> <ul style="list-style-type: none"> <li>• treat all prospective buyers honestly; and</li> <li>• not knowingly give false information.</li> </ul> <p>A buyer's agent, in his or her relationship with the buyer, generally must disclose to the buyer material facts the buyer's agent knows or should have known concerning the transaction.</p>	<a href="#">Me. Rev. Stat. Ann. tit. 32, §§ 13273, 13274 (2006)</a>
MARYLAND	<p>A licensee must, among other things,</p> <ul style="list-style-type: none"> <li>• disclose to his or her client all material facts, as required by statute;</li> </ul>	<a href="#">Md. Code Ann., Bus. Occ. &amp; Prof. § 17-532(c)(1) (2007)</a>

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Jurisdiction	General Requirements	Citation
	<ul style="list-style-type: none"> <li>• treat all parties honestly and fairly; and</li> <li>• answer all questions truthfully.</li> </ul>	
MINNESOTA	<p>A licensee must disclose to a prospective purchaser all known material facts that could “adversely and significantly affect an ordinary purchaser’s use or enjoyment of the property, or any intended use of the property of which the licensees are aware.” Nothing indicates whether this requirement extends to factors that affect only the property’s future sale.</p>	<a href="#">Minn. Stat. Ann. § 82.22, subd. 8 (2007)</a>
MISSOURI	<p>A buyer has the duty, among others, to disclose to his or her client adverse material facts that the licensee knows or should know.</p> <p>A seller’s agent</p> <ul style="list-style-type: none"> <li>• owes no duty or obligation to a customer, except to disclose all adverse material facts the licensee knows or should know; and</li> <li>• need not conduct an independent inspection or discover any adverse material facts for the customer’s benefit.</li> </ul>	<a href="#">Mo. Ann. Stat. §§ 339.730, .740 (2007)</a>
MONTANA	<p>A licensee must try to ascertain all pertinent facts concerning property in any transaction in which the licensee acts, so that the licensee may “avoid error, exaggeration, misrepresentation, or concealment of pertinent facts.”</p>	<a href="#">Mont. Code Ann. § 37-51-313 (2007)</a>
NEBRASKA	<p>A buyer’s agent is a limited agent with the duty, among others, to disclose in writing to the client known adverse material facts. A seller’s agent owes no duty to a buyer, except that the licensee must disclose in writing all known adverse material facts, including, <i>but not limited to</i>, those pertaining to environmental hazards that are required to be disclosed by law, the property’s physical condition, material defects in the property or its title, or any material limitation on the client’s ability to perform the contract’s terms. Nothing indicates whether this duty would include the disclosure of any private transfer fees.</p>	<a href="#">Neb. Rev. Stat. Ann. §§ 76-2417, -2418 (2007)</a>
NEVADA	<p>A licensee who has entered into a brokerage agreement must, among other things,</p> <ul style="list-style-type: none"> <li>• disclose material facts to his or her client; and</li> <li>• not deal with any party to a transaction in a “deceitful, fraudulent or dishonest manner.”</li> </ul> <p>Also, a licensee acting as an agent in a real estate transaction must disclose to each party any material facts that he or she knows or should have known, among other things.</p> <p>The disclosures must be made as soon as practicable, but no later than the date and time the client or any party not represented by a licensee signs any written document.</p>	<a href="#">Nev. Rev. Stat. Ann. §§ 645.252, .254, .3205 (2007)</a>
NEW HAMPSHIRE	<p>A licensee who provides services pursuant to a brokerage agreement has the duty of disclosure, among others. A licensee also</p>	<a href="#">N.H. Rev. Stat. Ann. §</a>

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Jurisdiction	General Requirements	Citation
	<p>may not knowingly commit or be a party to any "material fraud, misrepresentation, concealment, conspiracy, collusion, trick, scheme or device, whereby any other person relies upon the word, representation or conduct of the licensee."</p> <p>Furthermore, a seller's licensee must treat all prospective buyers honestly.</p>	<a href="#">331-A:25-a, -b; :26 (2007)</a>
NEW JERSEY	A licensee must deal fairly with all parties to a transaction	N.J. Admin. Code §§ 11:5-6.4(a) (Lexis-Nexis 2007)
NEW MEXICO	<p>A licensee owes the following duties to all customers and clients:</p> <ul style="list-style-type: none"> <li>• to act with honesty; and</li> <li>• to disclose any adverse material facts the broker actually knows about the property or the transaction.</li> </ul>	<a href="#">N.M. Admin. Code tit. 16, § 61.19.8 (2008)</a>
NEW YORK	<p>The disclosure form set forth at § 443(4)(a) delineates that a buyer's agent owes the buyer the duty of full disclosure. A seller's agent dealing with a buyer must, among other things,</p> <ul style="list-style-type: none"> <li>• deal honestly, fairly and in good faith; and</li> <li>• disclose all known facts that materially affect the value or desirability of property, unless otherwise provided by law.</li> </ul>	N.Y. Real Prop. Law § 443(4)(a) (2006)
NORTH CAROLINA	The commission may reprimand, suspend, or revoke a real estate license if the licensee makes a willful or negligent misrepresentation or omits a material fact.	<a href="#">N.C. Gen. Stat. § 93A-6 (2006)</a>
NORTH DAKOTA	A real estate brokerage firm and any licensees that provide services pursuant to a written agency agreement have the duties of disclosure and diligence (among others) to a client. Also, in a real estate transaction involving residential property with dwelling units for one to four families, a licensee must present a written disclosure that states, among other things, that no licensee may deal unfairly with any party, regardless of whether the party is represented by that licensee.	<a href="#">N.D. Cent. Code § 43-23-12.1 (2007)</a> ; <a href="#">N.D. Admin. Code § 70-02-03-15.1(7)(e) (2007)</a>
OHIO	A licensee, acting as a client's agent or subagent, is the client's fiduciary and must use best efforts to further the client's interest, including disclosing to the client any material fact that the licensee knows or should know and that is not confidential information. Also, a licensee may not knowingly give false information to any party to a real estate transaction.	<a href="#">Ohio Rev. Code Ann. §§ 4735.61, .62 (2007)</a>
OKLAHOMA	A single-party broker must treat all parties with honesty.	<a href="#">Okla. Stat. Ann. tit. 59, § 858-354 (2007)</a>
OREGON	<p>A buyer's agent owes the buyer, other principals and their agents the following duties, among others:</p> <ul style="list-style-type: none"> <li>• to "deal honestly and in good faith"; and</li> <li>• to disclose known material facts which are "not apparent or</li> </ul>	<a href="#">Or. Rev. Stat. §§ 696.805, .810 (2005)</a>

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Jurisdiction	General Requirements	Citation
	<p>readily ascertainable."</p> <p>Similarly, a seller's agent owes the seller, other principals, and their agent the following duties, among others:</p> <ul style="list-style-type: none"> <li>• to "deal honestly and in good faith"; and</li> <li>• to disclose known material facts which are "not apparent or readily ascertainable."</li> </ul>	
PENNSYLVANIA	A licensee owes consumers the duty to deal honestly and in good faith.	63 Pa. Stat. Ann. § 455.606a(a)(2) (West 2007)
PUERTO RICO	A licensee may not deliberately conceal essential information regarding a property's condition, with the purpose of inducing a party to conclude the transaction in certain terms that, if he had been aware of the information, he would not have completed the transaction or would have paid a lower price. Nothing specifies whether this restriction applies only to physical conditions.	<a href="#">P.R. Laws Ann. tit. 20, § 3054 (LexisNexis 2004)</a>
RHODE ISLAND	<p>Before May 1, 2008, a licensee must, among other things,</p> <ul style="list-style-type: none"> <li>• protect and promote his or her principal's interests while dealing fairly with all parties to the transaction;</li> <li>• make a diligent effort to ascertain all pertinent information and facts concerning every property for which he accepts an agency; and</li> <li>• reveal, in writing, all material information and facts to any other party.</li> </ul> <p>Also, a listing agent must treat a buyer honestly and fairly, and a buyer's agent owes the buyer a "fiduciary duty of utmost care, integrity, honesty, loyalty, disclosure and confidentiality."</p> <p>Effective May 1, 2008, a neutral transaction facilitator owes a customer the duty to perform only "ministerial acts" with "honesty, good faith, reasonable skill and care."</p>	<a href="#">R.I. Gen. Laws §§ 5-20.6-1, -4, -6 (2007)</a>
SOUTH CAROLINA	<p>A buyer's agent must disclose to the buyer all relevant facts that the licensee knows or reasonably should know. A prospective buyer who uses a licensee's services but does not establish an agency relationship is considered a customer, who must receive fairness, honesty, and accurate information.</p> <p>A seller's agent must</p> <ul style="list-style-type: none"> <li>• treat all prospective buyers honestly; and</li> <li>• not knowingly give buyers false or misleading information that the licensee knows or should know about the property's condition. (Nothing indicates whether this is limited to the</li> </ul>	<a href="#">S.C. Code Ann. § 40-57-137(F), (H), (O) (2008)</a>

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Jurisdiction	General Requirements	Citation
	property's physical condition.)	
SOUTH DAKOTA	A buyer's agent must disclose to his or her client known adverse material facts. Also, although a seller's agent owes no fiduciary duty to a customer, the licensee must disclose all known adverse material facts to any customer.	<a href="#">S.D. Codified Laws §§ 36-21A-134, -136 (2007)</a>
TENNESSEE	A licensee must disclose to each party any known adverse facts.	<a href="#">Tenn. Code Ann. § 62-13-403 (LexisNexis 2007)</a>
UTAH	Utah's regulation providing that a buyer's agent has a duty of full disclosure addresses only the agent's obligation to tell the buyer "all material information which the agent learns about the property or the seller's . . . ability to perform his obligations."	<a href="#">Utah Admin. Code r. 162-6.2.15.2(c) (2007)</a>
VERMONT	It is "unprofessional conduct" for a licensee to fail to disclose to a buyer all known material facts concerning the property being sold. Vermont regulations include, as an example of a material fact, a "limitation in the deed that could substantially impair the marketability or use of the property and thereby diminish its value."	<a href="#">Vt. Stat. Ann. tit. 26, § 2296(a)(9) (2007)</a> ; <a href="#">04-030-290 Vt. Code R. § 4.5(a) (2003)</a>
VIRGIN ISLANDS	A licensee may be disciplined for pursuing "a continued and flagrant course of misrepresentation."	<a href="#">V.I. Code Ann. tit. 27, § 429 (LexisNexis 2007)</a>
VIRGINIA	Effective July 1, 2007, a buyer's agent must disclose to the buyer known material facts related to the property or concerning the transaction. Also, a licensee must treat all prospective buyers honestly and not knowingly give them false information	
WASHINGTON	A licensee, whether or not an agent, owes to all parties to whom the licensee renders real estate brokerage services the following duties, among others: <ul style="list-style-type: none"> <li>• to deal honestly and in good faith; and</li> <li>• to disclose all known material facts which are not apparent or readily ascertainable.</li> </ul>	<a href="#">Wash. Rev. Code Ann. § 18.86.030 (2007)</a>
WISCONSIN	A broker providing brokerage services to a person in a transaction owes that person the following duties, among others: <ul style="list-style-type: none"> <li>• to provide services "honestly and fairly"; and</li> <li>• to disclose timely in writing all known material adverse facts that the person does not know or "cannot discover through reasonably vigilant observation," unless disclosure is prohibited by law.</li> </ul>	<a href="#">Wis. Stat. Ann. §§ 452.133 (2007)</a>
WYOMING	Both a buyer's agent and a seller's agent must disclose to the buyer known adverse material facts.	<a href="#">Wyo. Stat. Ann. §§ 33-28-303, -304 (LexisNexis 2007)</a>