

Condell Private Letter

Confidential Commentary, News, and Opinion for Land Title Executives

Toxic Transfer Fee Covenants Will Foul Up Chains, Annoy Title/Closing Firms for Decades to Come Hey, No Problem, Maybe. Freehold's Scam Gives Them a Cut of the Take

Opposition has become fierce. Eighteen states have banned them, or think they have. Congresspeople have introduced bills. FHA has ordered Fannie and Freddie to steer clear.

Too late. Private transfer fee covenants are here. Thousands of tracts nationwide are infected. More become so every day.

Like it or not, title people will have to deal with them. They'll be mis-indexed by clerks and recorders and muffed by title plants. They'll get blown by searchers, botched by examiners, and fumbled by closers.

That's for starters.

If found and comprehended, processing will be a chore at best, a major pain at worst. Hassles will be endless. No one will be happy. Sellers will be angry and resentful. Lenders will demand deletion, coverage, positive insurance. Counsel will insist on title indemnities, declaratory judgments, quiet titles, interpleaders, class actions – all while demanding deals be closed.

Errors will be made. Claims will happen. One percent of a selling price won't hurt a major title insurer. Enough hassles could.

As title people know, the builder mentality finds schemes like this impossible to resist. What's more, knock-offs can be expected. The real property continuum is wide open to invasion. New property interests and the tools to manage them blossom on napkins every day. In no business arena anywhere are imaginations more prolific.

These things aren't new and come in varieties. Lawmakers seeking to squash them will have trouble sorting the legitimate from the ugly. Some seem simply fees of opportunity – like gotcha credit card charges – imposed because somebody can. Homebuilder Lennar's program in California is different, funneling fees from downstream sellers into a Lennar-related charity which ultimately channels them to Lennar as help for low-income consumers buying its houses.

Others seem rational, reasonable, fair, appropriate, considered. Gated communities and condo developments use them to fund maintenance and capital improvements, things for the common good.

And then there's the Freehold Capital Partners version. If this one doesn't get the title industry's attention, nothing can. It claims more than 5,000 developers in 43 states, all of whom have loaded its covenants into their \$600 billion worth of real estate. It wants securitizers to load its 99-year income stream into pools and slice them into securities, providing a major cash-out now.

At Freehold's core is a mandated catch-all 13-page "Declaration of Covenants, Conditions and Restrictions" document all developers must use. It is both cunning and clumsy. It knows about state variations in law and custom and tries – not always artfully – to cover them all. It knows how title companies and closing/escrow agents work and drags them in, first as enforcers to collect the fees, then as henchmen to claim their cut, and then as bagmen to send the rest of the cash downtown. Then it warns of dire consequences if they fail to perform.

"d. The liability of a Closing Agent, including a title company issuing a policy of title insurance, is limited to one percent of the Gross Sales Price, together with court costs and fees incurred by Trustee in connection with collection of same."

*Declaration of Covenants, Conditions and Restrictions, p 3, ¶ 8d;
Freehold Capital Partners, LLC*

The document won't quit, creating liens, liabilities, systems for payment, on and on. Then it decides its scheme is actually the licensing of a patented "business system," and, in a final twist, makes its victims (downstream homesellers) indemnify *it* (the business system) against loss.

So title companies confronting Freehold's and other documents will have a job on their hands. What is this document, actually? What does it do in this state, given our statutes, regulations, case law, regional customs? And how will our judiciary view it? Does that new law of ours banning such covenants kill this particular one or not? If so, how? Do we show it or not? Obey it or ignore it? Who says?

If there were ever a time for unified action, this is it. Title companies must decide whether they want to *take what comes* on these schemes – on an every-man-for-himself basis – or *take it on*, in a unified, mature, and responsible fashion, all companies working in concert. Not yelling at Congress or Fannie or ALTA to act, taking action themselves as a comprehensive and responsible business community.

Let's be clear. This is the title industry's space. All others stand clear. Title firms have the responsibility here. The nation needs them. Their vast, arcane, and complex disciplines. Their power to shape the transactional marketplace in positive ways. Their critical gate-keeping functions without which real property cannot move. These forces are crucial, in hand, and cry out to be used.

Ladies and gentlemen, this is why you are on this earth. ♣