Long-term Right to Sell Contracts: A Benefit to Homeowners?

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In at least 16 different states, several companies are approaching homeowners with a deal that looks very attractive. The company offers the homeowner money (a few hundred to a few thousand dollars), in return for the homeowner's execution of a "Homeowner Benefit Agreement" (HBA). The HBA effectively purports to grant the company the exclusive right to sell the home, in exchange for a 6% commission upon sale. However, this is no customary exclusive right-to-sell agreement—it has a term of up to 40 years; it purports to create a lien on the property to secure the homeowner's future commission obligation; it states that the agreement is a covenant running with the land to bind successors; it is assignable by the company; and the homeowner's death effectively triggers a fee of 3% of the home's value unless the homeowner's heirs/devisees agree to assume the HBA's obligations for the balance of the term. And a memorandum of the HBA is recorded within the homeowner's chain of title.

The HBA raises numerous practical and legal concerns. The homeowner binds himself for 40 years to a commission rate at the high end of today's scale—but what innovations in the pricing of commissions and the sale of real estate will occur over that 40 years? The homeowner cannot be sure who will be the actual broker selected to market the home if the owner decide to sell—will they be experienced and competent? Will the homeowner remember what was signed years or decades before? If a sale occurs through a broker the homeowner engages, what happens when at closing the recorded memorandum is discovered and another broker insists on a commission? What actions trigger the payment of the (six percent) commission aside from a voluntary sale to a third party for full value? What about a transfer to a trust? What happens if the homeowner dies? Does the covenant run with the land? What happens if the homeowner wants to obtain a home equity loan or refinance an existing mortgage loan, or obtain a reverse mortgage? Some of these uncertainties impact the desirability of the bargain, while others implicate law and legality.

More than a decade ago, private transfer fee covenants swept the country, with developers imposing agreements by which they retained a multi-decade right to share in the upside of resales, which explicitly purported to run with the land. R. Wilson Freyermuth, Private Transfer Fee Covenants: Cleaning up the Mess, 45 Real Prop.Tr. & Est. L.J. 419 (2010). In short order, 42 states outlawed those covenants, most of them relying on a model statute drafted by the National Association of Realtors (NAR) and the American Land Title Association (ALTA). The HBAs are similar, but different. Generally they expire on the first sale, so they don't tend to last as long. The homeowner can also pay a fee at any time (approximately 3% of the home's value) to terminate the agreement. Thus, unlike transfer fee covenants, the HBAs generally do not lower the value of the affected real estate to subsequent purchasers. At the same time, HBAs are a significant departure from past custom—under which homeowners select their own broker they entrust to sell their home, brokers ordinarily don't pay upfront bonuses to homeowners and, while exclusive rights to sell are common, they generally do not last beyond a year from their execution.

Among the legal impediments the HBAs appear to violate is the common law requirement that for the burden of a covenant to run with the land, a covenant's benefit must touch and concern some land rather than exist in gross. Covenants that fail this requirement are mere personal obligations and cannot bind successor owners. See Freyermuth, *supra*, at 430-448. The HBAs also purport to impose a lien on the home—and this lien (as reflected in the recorded memorandum) is asserted by the companies as a basis to compel payment of the fees arising under the agreement when the homeowner sells the home without using the company's services. But the HBA does not obligate the homeowner to sell during the 40-year term (only to grant the company the exclusive right to sell during that term). Because a lien must secure an obligation, can a lien truly exist—and survive the death of the homeowner—if the homeowner never placed the home on the market during her life?

The longstanding real estate policy against unreasonable restraints on alienation, embodied in the Restatement (Third) on Servitudes that abandons the touch and concern requirement, could have broader application here to strike down the HBA against even the signing homeowner, particularly if the covenant is written in a way that discourages lenders, impedes the giving of easements, or discourages conveyances at a time when commission fees average far less than the exclusive agreement formula. The Restatement also would invalidate covenants that unreasonably restrain trade or competition, or are unconscionable. Restatement §3.1. Fraud or advantage-taking in the bargaining process, such as misrepresentations or the targeting of elderly homeowners who don't understand their bargain, may lead to contract challenges sourced in fraud, unfair or deceptive trade practice acts, or common law unconscionability, the latter perhaps sourced in the claimed procedural unfairness of an owner's inability to accurately assess the value of the consideration—the up-front payment—as compared to the (distant) future commission obligation the homeowner takes on.

Before courts tackle these new arrangements, they might be outlawed or constrained by other actors. Having offered states a model act to prohibit transfer fee covenants, NAR and ALTA may simply propose a modification of the broker commission exception to that prohibition to deny enforcement of HBAs as covenants running with land. Relatedly, as has been discussed in Washington, states might legislate to shorten the term of the permissible exclusive right to sell, with an outer limit of two or three years. State attorneys general could regulate specific unfair or deceptive trade practices in the selling or structuring of the HBA.

Innovators view real estate as ripe for disruption, whether of public land records through blockchain technology, or the WeWork model of subleased coworking spaces. Some innovations add value and others are, or border on, abuse, such as transfer fee covenants or the selling of decrepit homes through installment land contracts. Where long-term exclusive rights to sell fall on the value spectrum remains to be seen, but there is reason for suspicion. If HBAs create valid rights that run with land, why not other personal service contracts related to real estate? Can the pest control company obtain a 40-year durable right to provide pest services? Can a landscaping company acquire a 50-year right to provide landscaping services? Can an ISP acquire a 60-year right to provide internet service? There appears no compelling reason why such personal covenants should be allowed to affect title to land, regardless of the sum dangled in front of the homeowner.