

Underwriting Bulletin: UNTX-2021-008

Date: September 9, 2021
To: Texas Agents
From: David Hays, General Counsel
RE: **Private Transfer Fees**

In recent weeks, we have received numerous questions regarding the validity of Private Transfer Fees and increased requests by proposed insureds to remove any exception to the filed Notices of Private Transfer Fees. As a result of this increase in inquiries, in addition to other recent developments, we would like to address the Private Transfer Fees liens and clarify FNTI's current underwriting position.

As a refresher, a "private transfer fee" is generally defined as an amount of money, regardless of the method of determining the amount, that is payable on the transfer of an interest in real property or payable for a right to make or accept a transfer.

In 2011 the Texas Legislature enacted new laws effectively prohibiting the creation of new private transfer fees on real property. However, existing private transfer fees were grandfathered in on the condition that a person or entity entitled to receive the private transfer fee ("Creditor" for purposes of this bulletin) created prior to June 11, 2011 had to file a "Notice of Private Transfer Fee Obligation" ("Notice") on or before January 31, 2012 and then refile the Notice not earlier than the 30th day before the third anniversary of the original filing date described by Subsection (a) and within a similar 30-day period every third year thereafter. (For full statute, see Texas Property Code Section 5.202). Under the law, failure to strictly comply with the statutory notice requirements acts to forever terminate the private transfer fee. See also Texas Attorney General Opinion No. KP-0195.

Notwithstanding the foregoing statutes and AG Opinion, and notwithstanding the fact that in many cases, solid evidence exists to conclude that the private transfer fee has been terminated for reasons such as, but not limited to, voluntary termination, foreclosure of prior liens or in many instances, failure to strictly comply with recording requirements, Creditors and/or their management companies employed to file and collect the private transfer fees are taking the position that these fees are valid and existing encumbrances against the property. And, because the private transfer fees are often created and recorded at the time of development and in some instances on parent tracts prior to development, the fee operates akin to a non-subordinated HOA lien, in that its priority position is established at recording for amounts that may become due at a later date. Because of the manner in which the private transfer fee is created and filed of record, they affect not only current sales of real property, but also refinance transactions, as we have no way of knowing, for example, if the private transfer fee was paid at the time of the purchase transaction by the current borrower for the refinance.

Due to the potential liability created by the private transfer fees, the recent inquires, and knowledge that the Creditors are taking the position that these liens are valid notwithstanding apparent lack of compliance, FNTI requires the following:

- The original document creating the private transfer fee, and all subsequent notices must be included as Schedule B Exceptions. If amounts due are paid or a release or statement that nothing is due for the current transaction is obtained from the Creditor, the exception must remain on Schedule B of the Owner's Policy since the private transfer fee is still an encumbrance to be dealt with when the insured owner sells the property;

- The Schedule B Exception cannot be removed unless one of the following requirements is met:
 - In the case of a refinance, the Creditor or Creditor's management company is contacted and provides a written statement that nothing is due;
 - Evidence is provided to the Creditor or Creditor's management company that the private transfer fee has been terminated by voluntary termination, foreclosure of a prior lien, failure to strictly comply with the statutory requirements, or by some other means and the Creditor or Creditor's management company provides a recordable release.

The agent should not make a decision as to the validity of a private transfer fee.

Should you have further questions regarding a private transfer fee, do not hesitate to contact our underwriting team.