The Business, Entrepreneurship & Tax Law Review

Volume 7 | Issue 1 Article 9

Can a Homeowner Benefit Agreement Run with the Land to Bind Successors?

Maxwell Rubin

Can a Homeowner Benefit Agreement Run with the Land to Bind Successors?

Maxwell Rubin[*]

ABSTRACT

Laws governing the enforceability of brokerage contracts are largely uniform and provide stable outcomes in the event of broker or client breach. Brokerage contracts reflect a hybrid of property and contract law principles that work to provide predictable expectations and reasonable financial protection and responsibility to each party in an agreement. A novel business model, characterizing itself as a brokerage agency, has challenged traditional property and agency law principles governing the enforceability of brokerage agreements. In the past decade, MV Realty has proposed an agreement where it provides homeowners a small percentage of their home value; the homeowner obligating themselves to use the brokerage agency for forty years if they so choose. The HBA is recorded in the homeowner's county land records, which purports to bind subsequent owners to this agreement. This article assesses the enforceability of MV's agreement relying on traditional principles governing lis pendens, broker-homeowner contracts, and primarily, touch and concern. MV's agreement essentially creates a future right to damages for a breach of a non-existent future obligation.

[*] J.D. Candidate, University of Missouri School of Law, 2024; B.A. Political Science, B.A. Mandarin Chinese, St. Olaf College, 2021. I would like to thank Professor R. Wilson Freyermuth for providing the opportunity to write about this unique residential brokerage business concept and providing guidance throughout the research process; I would also like to thank Professor Royce de R. Barondes for providing direction to the contracts analysis portion of this research. In addition, I would like to thank Matthew Thomas, Managing Editor of the Business, Entrepreneurship, & Tax Law Review ("BETR"), for exceeding his duties as Managing Editor for making this publication possible. Finally, I would like to thank the entire editorial board of BETR for their support.

I. INTRODUCTION

Active in thirty-three states with at least 32,000 participating homeowner clients as of August 2022, MV Realty seeks to provide brokerage services to American consumers while offering cash incentives to homeowners.[1] MV's novel business model is contrary to common types of listing agreements, such as exclusive right-to-sell, exclusive agency listings, and open listings.[2] The legal ramifications of MV's agreement are complex and pose questions of its enforceability against successors.

II. DEFINING A HOMEOWNER BENEFIT AGREEMENT

Florida-based MV Realty offers consumers what they call a "Homeowner Benefit Agreement" ("HBA").[3] By its terms, this is an Agreement (hereinafter referred to as the "Agreement" as is in the HBA) to agree to an agency between the brokerage company, MV, and the homeowner, MV's client ("Property Owner"), at an unspecified future date.[4] A transaction involves MV approaching a property owner and agreeing to pay "Property Owner" ("PO") a "Promotion Fee."[5] The HBAs obtained do not specify how the "Promotion Fee" is calculated but they range from a few hundred to mid-single thousand dollars depending on one's home value.[6] In exchange for a "Promotion Fee," PO agrees not to engage any other broker to market the Property (hereinafter referred to as "Property" as is in the HBA) and not to list the property as "for sale by owner."[7] The HBA grants MV an "Exclusive Right

1. Complaint at Exhibit A, Massachusetts v. MV Realty PBC, LLC, No. 2284CV02823 (Mass. Supp. 2022); Complaint at Exhibit C, Exhibit D, Pennsylvania v. MV Realty PBC, No. 221201288 (Pa. D. & C., 2022); *Realty Introduces Residential Real Estate Title Monitoring Service*, CISON PR NEWSWIRE (Sept. 20, 2022), https://www.prnewswire.com/news-releases/mv-realty-introduces-residential-real-estate-title-monitoring-service-301628539.html.

2. *Section 3: Definitions of Various Types of Listing Agreements*, NAT'L ASS'N OF REALTORS (Jan. 1, 2021), https://www.nar.realtor/handbook-on-multiple-listing-policy/section-3-definitions-of-various-types-of-listing-agreements.

3. Massachusetts Complaint, *supra* note 1, at Exhibit A; Pennsylvania Complaint, *supra* note 1, at Exhibit C, Exhibit D (The Homeowner Benefit Agreement ("HBA") attached to the Complaint as Exhibit D is the most recent of the two HBAs, *see* Pennsylvania Complaint, *supra* note 1, at 11.); Todd Ulrich, *Action 9 Investigators Realtor Offer for Homeowners*, AFTV9 (Jan. 26, 2021, 6:37 PM), https://www.wftv.com/news/action9/action-9-investigates-realtor-offer-homeowners/HK5MX3SMXZF2LKHUPMIQWR7CVE.

4. Massachusetts Complaint, *supra* note 1, at Exhibit A §§ 1 (a), 1(b)(b); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 1(a), (d), Exhibit D §§ 1(a), (d).

5. Massachusetts Complaint, *supra* note 1, at Exhibit A § 1(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 1(a), (d), Exhibit D §§ 1(a), (d).

6. Paragraph 48 of the Pennsylvania Complaint specifies that MV's HBA program offers between $300–$5,000, while paragraph 53 of the Florida Complaint specifies offering between a $300–$5,000 payment. Massachusetts Complaint, *supra* note 1, at 25 (specifying that MV's loans are $6,000 or less); Pennsylvania Complaint, *supra* note 1, at Exhibit C, Exhibit D; Complaint at 16–17, Florida v. MV Realty PBC, LLC, No. 22-CA-009958 (Fla. Cir. Ct. 2022); Justin Gray, *Metro Homeowners Locked into 40 Year Contracts with Real Estate Company*, WSB-TV 2 ATLANTA (May 26, 2021, 6:47 PM), https://www.wsbtv.com/news/local/gwinnett-county/metro-homeowners-locked-into-40-year-contracts-with-real-estate-company/XIAVXYAXWRAMBPB6K7RQ3LHPKY (complaints offered by the Florida, Massachusetts, and Pennsylvania attorney generals specify that defendant MV Realty offers consumers between $300–$5,000 cash as a "loan alternative" but without requiring consumers to take out a loan).

7. Massachusetts Complaint, *supra* note 1, at Exhibit A § 1(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 1(a), Exhibit D § 1(a).

to List" the property until the earlier of (a) the expiration of forty years after the contract is signed or (b) the sale of the Property.[8]

Furthermore, the HBA is drafted to make PO's obligations a covenant running with the land.[9] In addition to providing 10 days for the PO to agree to be bound to the Agreement, the earlier versions of the Pennsylvania HBA and the Massachusetts HBA also include POs ceasing to be the owner due to foreclosure, forfeiture, or other transfer of the Property's interest whether or not it was voluntary.[10] By permitting MV to record a written memorandum of the HBA, MV gives constructive notice of these obligations to POs.[11] The HBA purports to create a lien on the respective Property for sums owed by the owner to MV but omits clear language indicating that the HBA creates a lien sufficient to secure all sums due under it.[12] Finally, any and all disputes arising under the HBA are submitted to binding arbitration.[13]

There are two general scenarios where the HBA provides that PO will owe MV a commission if a sale is effectuated during the HBA's duration.[14] The first scenario occurs if MV is the only participating broker, in which case, MV receives 6% of the commission.[15] The second scenario occurs if a sale arises during the HBA's duration with a Cooperating Broker (e.g., a buyer's broker) giving PO a duty to split the

8. Massachusetts Complaint, *supra* note 1, at Exhibit A, §§ 1(a), 2; Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 1(a), 2, Exhibit D §§ 1(a), 2.

9. While only the Pennsylvania HBA in Exhibit C has explicit language purporting to bind successors, the overall intent in the HBA in Exhibit D and the Massachusetts HBA in provide similar language. For example, the exception for an Early Termination Event incentivizing successors to agree to be bound to the HBA for the remaining forty years (if it has yet to expire) of the Agreement to avoid facing an Early Termination Fee. Massachusetts Complaint, *supra* note 1, at Exhibit A §§ 2, 5(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 2, 5(a)–(b), Exhibit D §§ 2, 5(a).

10. The Early Termination Event is still subject to subparagraph 3(c) providing 10 days for the PO to agree to be bound to the Agreement. Massachusetts Complaint, *supra* note 1, at Exhibit A §§ 3(c)(i)–(ii); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 3(c)(i)–(ii) (the arbitration agreement purports to bind PO's "heirs, trustees, guardians, personal representatives, administrators, successors, and assigns . . .").

11. Massachusetts Complaint, *supra* note 1, at Exhibit A § 5(b); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 5(b), 2, Exhibit D § 5(b).

12. Massachusetts Complaint, *supra* note 1, at Exhibit A §§ 5 (a), 2 (paragraph 45 of the Massachusetts Complaint states that MV's current website plainly and incorrectly states that it does not file a lien on properties); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 5(a), 2, Exhibit D §§ 5(a), 2 (Paragraph 29 of the Complaint states that "Real estate brokers in Pennsylvania do not typically take a mortgage line on their clients' property before ever providing any services to them, but that is exactly what MV does . . . Yet instead of disclosing these important terms to consumers upfront, MV Realty buries them in the fine print of their contract.").

13. Massachusetts Complaint, *supra* note 1, at Exhibit A § 7; Pennsylvania Complaint, *supra* note 1, at Exhibit C § 7, Exhibit D § 7.

14. Massachusetts Complaint, *supra* note 1, at Exhibit A § 1(b); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 1(b), Exhibit D § 1(b).

15. If MV is the only participating broker of any sale (i.e., there is no "Cooperating Broker"), MV's commission shall be 6% of the total sales price of the property and no less than 3% of the property's current home value estimate. Massachusetts Complaint, *supra* note 1, at Exhibit A §§ 1(b), 7 (specifying a numerical value of MV's commission (e.g., $13,148.70) and requiring PO to pay whichever is greater, the specified number or a 6% commission of the total sales price); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 1(b), 7, Exhibit D §§ 1(b), 7 (specifying in the HBA in Exhibit C that MV shall not receive under 3% of the Property's current home value estimate and specifying in the HBA in Exhibit D a numerical value of MV'' commission (e.g., $8590.50) and requiring PO to pay whichever is greater, the specified number or a 6% commission of the total sales price).

commission between MV and the Cooperating Broker.[16] Several actions taken by PO can initiate a fee owed to MV besides a sale during the duration of the HBA.[17] If PO fails to perform any obligation of the Agreement, the HBA requires PO to pay liquidated damages, giving PO several options to choose from that indicate MV having sole determination as to the value of damages. [18] An Early Termination generally includes terminating or attempting to terminate the HBA resulting in MV losing the ability to collect compensation.[19]

However, there are exceptions to an Early Termination Event that purport the HBA to run with title to the respective property.[20] "[A] transfer to a spouse, heir(s) or devisee(s) or a transfer for estate planning purposes. . ." does not constitute an Early Termination Event.[21] The HBA requires that within ten days following a transfer that fails to result in MV earning a commission, the transferee spouse, other individual, or entity receiving an interest in the Property must execute an assumption of the HBA.[22]

Only the more recent HBA in Exhibit D of the Pennsylvania complaint gives PO the right to rescind within three business days following execution of the Agreement by sending written notice to the email address:

16. Massachusetts Complaint, *supra* note 1, at Exhibit A § 1(b); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 1(b) (requiring the Cooperating Broker to receive compensation that does not exceed 3% of the purchase price and requires MV to offer each Cooperating Broker an equal portion of the Cooperator's Commission (e.g., if there are two Cooperating Brokers, MV will offer each one 1.5% of the purchase price as compensation); Pennsylvania Complaint, *supra* note 1, at Exhibit D § 1(b) (requiring PO to determine at "his or her sole discretion, what amount of commission will be offered to the Cooperating Broker. . .[,]" further requiring that the total sum of the commission to MV and the Cooperating Broker equals 6%.).

17. Massachusetts Complaint, *supra* note 1, at Exhibit A § 3(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 3(a), Exhibit D § 3(a).

18. Damages are in the amount of the greater of: 3% of the Property's current Realtors Valuation Model home value estimate) or (ii) 3% of the fair market value of the Property at the time of the breach, or an (iii) Early Termination Event as "reasonably determined" by MV. Massachusetts Complaint, *supra* note 1, at Exhibit A § 3(a) (referring to the fair market value of the property which is presumably synonymous or comparable to the Realtors Valuation Model value estimate specified in both HBAs included in the Pennsylvania complaint); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 3(a), Exhibit D § 3(a).

19. Both Exhibits A and C of the Pennsylvania Complaint specify that PO terminating or attempting to terminate the MV's right to act as the exclusive listing agent for the Property; or (2) PO no longer owns the Property due to foreclosure, forfeiture, or has transferred interests in the Property (voluntary or involuntary) subject to subparagraph 3(c). Massachusetts Complaint, *supra* note 1, at Exhibit A §§ 3(c)(i)–(ii) (also includes language that PO entering into a "Competing Engagement" counts as an Early Termination Event); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 3(c)(i)–(ii), Exhibit D, § 3(c) (only includes termination and attempting to terminate as similar Early Termination events).

20. Massachusetts Complaint, *supra* note 1, at Exhibit A § 3(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 3(a), Exhibit D, § 3(d) (This HBA differs in that in addition to the ten-day period following a sale or transfer in which MV is not paid, an exception for an Early Termination Even can also occur "as soon as the circumstances reasonably warrant.").

21. Massachusetts Complaint, *supra* note 1, at Exhibit A § 3(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 3(a), Exhibit D § 3(d).

22. The assumption agreement must be "in form and substance satisfactory to Company, whereby . . ." the party agreeing to the HBA "if any, agrees to be bound by this Agreement, with the same effect as if they had originally been the Property Owner hereinunder. Massachusetts Complaint, *supra* note 1, at Exhibit A § 3(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 3(a), Exhibit D § 3(c) (This HBA differs in that in addition to the ten-day period following a sale or transfer in which MV is not paid, an exception for an Early Termination Even can also occur "as soon as the circumstances reasonably warrant.").

cancel@homeownerbenefit.com.[23] PO has ten days from the date of PO's notice of election to rescind that it must repay all funds received from MV.[24]

There is one narrow exception that allows PO to exit the HBA without liability to MV.[25] This exception results if PO decides to market the Property but MV is unable to sell the Property within six months of execution following a listing Agreement or on terms consistent with MV's.[26] After the six-month period, the HBA allows PO to attempt to procure a buyer independent of MV's efforts for a 60-day period ("Owner Listing Period") immediately after the Exclusive Listing Period.[27]

Perhaps to prevent its cloud on PO's title, Exhibit D contains a subsection outlining the situations in which it will subordinate its lien at PO's request.[28] Such situations include PO refinancing or obtaining a new mortgage and foreclosure due to a third party.[29]

---

23. Pennsylvania Complaint, *supra* note 1, at Exhibit D § 11 (Paragraph 54 specifies that this is the more recent HBA, *see* Pennsylvania Complaint, *supra* note 1, at 11.).

24. Pennsylvania Complaint, *supra* note 1, at Exhibit D § 11 (the effective date of recission is the later of: (i) the date PO receives the acknowledgment of receipt from MV, or (ii) the date on which the funds MV paid to PO are returned to MV. PO shall permanently forfeit his or her right to rescind this Agreement which shall be binding and enforceable if MV does not receive all funds it paid to PO by the repayment deadline).

25. Massachusetts Complaint, *supra* note 1, at Exhibit A §§ 4(a)–(b); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 4(a)–(b), Exhibit D §§ 4(a)–(b).

26. Massachusetts Complaint, *supra* note 1, at Exhibit A § 4(a) (specifying that the six-month period begins if the Property is unsold, under agreement to be sold on consistent terms and conditions with the applicable Listing Agreement); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 4(a) (specifying that MV must be unable to procure a ready, willing, and able buyer on consistent terms and conditions with the Listing Agreement); Pennsylvania Complaint, *supra* note 1, at Exhibit D § 4(a) (specifying synonymous terms with Exhibit C except giving PO the ability to have reduced the listing price of the Property).

27. If PO enters into a contract with a Qualified Buyer in accordance with subparagraph 4(a) and the contract closes, the Property's title "transfers (i) on identical terms in subparagraph 3(a) and (ii) no later than the 60th day following the expiration of the Owner Listing Period, no Commission will be due and payable to MV in connection with this sale.

A "Qualified Buyer" is a ready, willing, and able buyer who (i) is unaffiliated with Property Owner, (ii) enters into an arm's length transaction for the purchase of the Property on the identical terms set forth in the Listing Agreement, and (iii) is not a person to whom Company showed the Property or was otherwise identified as a prospect by Company in accordance with the terms and conditions of the Listing Agreement.

Massachusetts Complaint, *supra* note 1, at Exhibit A §§ 4(a)–(b) (specifying that the purchase of the Property is at a price equivalent to or greater than the prior price listed during the term of the just expired listing Agreement); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 4(a)–(b), Exhibit D §§ 4(a)–(b). (Differing in that it requires PO to procure a buyer "at a price equal to or greater than the final listing price of the Property during the Exclusive Listing Period.").

28. Pennsylvania Complaint, *supra* note 1, at Exhibit D § 5(c).

29. Pennsylvania Complaint, *supra* note 1, at Exhibit D § 5(c) (the HBA includes a subsection that provides MV will consider a good faith request from PA to refinance or obtain a new mortgage by subordinating the lien of its Agreement to the refinanced or new mortgage. MV also specifies that if PO ceases to own the Property due to foreclosure, condemnation, or arms-length deed in lieu of foreclose to an unrelated third party, upon written request, MV will deliver the closing agent or purchaser a Notice of Termination its Memorandum in a recordable form).

III. LEGAL CONSEQUENCES OF MV'S HBA

MV's HBA seems like a prime opportunity for cash-strapped homeowners to obtain "easy" or "free cash" in exchange for brokerage services.[30] However, one significant consequence of signing the HBA is that it is recorded on PO's deed, posing a potential financial burden on future owners that is uniquely tied to the land.[31] This potential burden falls on PO's administrator, personal representative heirs or devisees receiving the Property's title, which shall vest as a matter of law, on these parties.[32] If a subsequent party receiving title to PO's land refuses to assume the HBA, it will be considered an Early Termination Event.[33]

HBAs can still pose financially harmful consumer consequences to the original signatory of the HBA. An elderly Georgia woman who had entered an HBA with MV experienced the sale of her home being blocked by MV due to their putting a lien on her property.[34] In Ms. Wanda Babb's case, a representative from MV came to her house while she was recovering from hospitalization and told her that she owed MV $6,000 (3% of her home's value) for selling without MV's services.[35] Both real estate agents representing Ms. Babb and her buyer waived their commissions so that Ms. Babb could pay the penalty to MV and sell the home.[36] In a Florida case, a woman received $1,000 from MV for signing an HBA and paid MV $8,000 for canceling the Agreement.[37] Ms. Eleanor Gardner, the signatory, alleged that MV did not sign her copy of the contract she signed and included pages she never saw when signing it, which she claimed included the 40-year duration.[38] A Vermont woman highlighted the peculiarity of signing an HBA saying, "She [presumably, an MV agent] never did any kind of a showing, never did any kind of an open house . . . She did no work. I thought that was the end of the contract."[39]

The HBA has also posed challenges to a Missouri homeowner. A St. Louis area resident, Ms. Allen had been heavily pursued over her telephone to enter an HBA, finally relented and received a $500 check after the caller had told her she could receive up to $2,000.[40] Never learning about a purported lien being filed on her house, Ms. Allen could not take out a home equity loan on the house she was

30. Massachusetts Complaint, *supra* note 1, at Exhibit A § 1(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 1(a), Exhibit D, § 1(a); Ulrich, *supra* note 3.
31. Massachusetts Complaint, *supra* note 1, at Exhibit A § 5(b); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 5(b), Exhibit D § 5(b).
32. Massachusetts Complaint, *supra* note 1, at Exhibit A § 1(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 1(a), Exhibit D § 1(a).
33. Massachusetts Complaint, *supra* note 1, at Exhibit A § 3(c); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 3(c), Exhibit D § 3(c).
34. Gray, *supra* note 6.
35. *Id.*
36. *Id.*
37. Ulrich, *supra* note 3.
38. *Id.*
39. *I-Team: Rutland Couple Locked Into 40-Year Agreement With Realtor After Signing 'Homeowner Benefit Agreement'*, CBS BOST. (Mar. 4, 2022, 6:34 PM), https://www.cbsnews.com/boston/news/iteam-real-estate-homeowner-benefit-agreement-rutland.
40. Jacob Barker, *Florida Real Estate Firm Accused of Equity Theft by St. Louis Homeowners*, ST. LOUIS POST-DISPATCH (Dec. 23, 2022), https://www.stltoday.com/news/local/crime-and-courts/florida-real-estate-firm-accused-of-equity-theft-by-st-louis-homeowners/article_55f4f406-7a6f-5a9e-9432-f5d194029028.html.

planning to remodel because of this extra lien on her property.[41] In Missouri alone, there are an estimated 100 contracts between MV and homeowners with 40 of them in the St. Louis metropolitan area.[42]

Various legal questions as to the enforceability and desirability, or lack thereof, of the HBA arise. These include, but are not limited to, the HBA purporting to secure a lien on a Property which could pose consequences for a homeowner refinancing or whether HBAs constitute an unreasonable restraint on trade. This paper seeks to answer if the HBA is an enforceable contract and whether it can be made to run with the land and bind successors.

IV. THE LAW OF AGENCY AND REAL ESTATE BROKERAGE CONTRACTS

MV has tried to strengthen its Agreement with PO by enforcing a contract typically only enforceable between the parties to the contract by making it appear to be an outright exclusive listing contract at the moment PO signs an HBA.

Usually, a real estate listing creates an agency relationship between brokers and homeowners; some courts have gone as far as to characterize a real estate broker as a "special agent of restricted authority."[43] Contracts between brokers and homeowners are personal and fiduciary, and are terminated by death or renunciation by the agent, who acts as a broker.[44] The principal (the client, buyer, or seller) can also terminate a listing contract by death or revocation, unless the agent has an interest in the subject of the agency.[45]

The obligations and nature of the HBA help determine whether it can be enforced against non-original parties to the contract who do not assume it.[46] An exclusive listing contract's termination upon the agent (broker) or principal's PO death illustrates that the HBA is solely a personal contract between the contracting parties and should not extend beyond the lifetime of either PO or MV.[47] In *Charles B. Webster Real Estate v. Rickard*, the Court of Appeals for the 5th District of California held that an exclusive listing agreement terminated on the principal's death.[48] On May 26, 1967, Dr. Moore and his wife had entered into "an exclusive and irrevocable right to sell a 156-acre vineyard at a state price of $234,000, for a

41. Both the Pennsylvania Complaint and this news story show that MV's offer to subordinate its lien in § 5(c) if PO refinances his or her home or obtains a new mortgage is ineffective in removing its cloud on PO's title. This is most likely regardless of whether § 5(c) is included in the HBA or not, demonstrating that lenders have no trust in MV cooperating with them. Furthermore, this lien should not affect PO's ability to get financing if there were a clear and unambiguous understanding in the HBA that a MV would subordinate its lien in certain circumstances. *Id.*; Pennsylvania Complaint, *supra* note 1, at 18 (a Philadelphia homeowner also failed to obtain a home equity loan a few months after executing the HBA because MV had a mortgage lien on her property).

42. Barker, *supra* note 39.

43. *See* Charles B. Webster Real Est. v. Rickard, 98 Cal. Rptr. 559, 561 (Cal. Ct. App. 1971); Smith v. H.C. Bailey Co., 477 So. 2d 224, 235 (Miss. 1985). *But see* Vallis v. Rimer, 140 N.E.2d 638, 641 (Mass. 1957).

44. *Rickard*, 98 Cal. Rptr. at 561.

45. *Id.*

46. Cushman & Wakefield of Md., Inc. v. DRV Greentec, LLC, No. 0369, 2018 WL 3025859, at *6 (Md. Ct. Spec. App. June 18, 2018).

47. *Rickard*, 98 Cal. Rptr. at 561; *H.C. Bailey Cos.*, 477 So. 2d at 235; Treasurer and Receiver Gen. v. Sheehan, 193 N.E. 46, 47 (Mass. 1934); Brown v. Cushman, 53 N.E., 860, 861 (Mass. 1899).

48. *Rickard*, 98 Cal. Rptr. at 565.

term ending on December 31, 1968," which included a 5% commission paid to the broker if the property was sold during the length of the agreement.[49] The Court reasoned that, if the principal had accepted the benefit of the broker's efforts, he may be liable for the reasonable value of the broker's services.[50] That not being the case, the principal's estate was not liable for the broker's commission.[51]

Similar to the *Rickard* case, MV is unlikely to be successful in recovering any fee from PO, PO's estate, or its successors, before taking significant steps that entitle it to a commission after PO appoints MV as an agent.[52] If PO appoints MV as its agent, the agency relationship should be construed as unenforceable beyond the life of PO, provided that MV does not fulfill a broker's duties.[53] A broker's commission is earned when, "during the agency, he finds a purchaser, able and willing to buy, and who actually offers to buy on the terms stipulated by the owner."[54] If MV cannot prove that it found a ready, able, and willing buyer on PO's terms, it is not entitled to a commission from PO, PO's estate, or PO's assigns who do not assume the HBA.[55] Even Chief Justice Marshall recognized that an agency agreement terminates when, "That a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest,' which survives the person giving it, and may be executed after his death."[56] The intrinsic personal nature of a listing contract should prevent the enforceability of the HBA beyond PO's lifetime whether or not MV has been appointed as an agent.[57] Otherwise, enforcing the HBA independent of MV showing it complied with PO's terms would be to enforce a contract that would be "render[ed] impossible the performance contemplated . . ." between its parties.[58] To construe in favor of MV would allow them to reap a windfall of unearned profits.[59]

V. WHETHER THE HBA CREATES A VALID LIS PENDENS

MV has tried to strengthen the enforceability of its Agreement with PO by attempting to create the effect of a lis pendens without any present obligation on PO.

A lis pendens is a notice to alert creditors, prospective purchasers, and others to identify that title to a particular piece of real property is involved in litigation.[60] *Hunting World, Inc. v. Super. Ct* presents an appropriately filed lis pendens where Hunting World, Inc. filed an action to set aside a fraudulent transfer between two other parties in a lawsuit claiming trademark infringement and counterfeiting of its merchandise.[61] The California Court of Appeals held that a lis pendens was valid

49. *Id.* at 560.
50. *Id.* at 565.
51. *Id.*
52. Int'l Network, Inc. v. Woodard, 2017 COA 404, ¶ 27, 405 P.3d 424, 430.
53. W.B. Martin & Son v. Lamkin, 188 Ill. App. 431, 436 (Ill. App. Ct. 1914).
54. *Id.*; Thorton v. Lewis, 126 S.E.2d 869, 329–330 (Ga. Ct. App. 1962).
55. *Thorton*, 126 S.E.2d at 871.
56. *Lamkin*, 188 Ill. App. at 436 (quoting Hunt v. Rousmanier's Adm'rs, 21 U.S. (8 Wheat.) 174 (1823); There is no need to discuss an agency coupled with an interest because the HBA does not immediately create an agency agreement between MV and PO).
57. *Id.*
58. Charles B. Webster Real Est. v. Rickard, 98 Cal. Rptr. 559, 563 (Cal. Ct. App. 1971).
59. *Lamkin*, 188 Ill. App. at 437.
60. Sailfish Point, Inc. V. Sailfish Point Owners Representatives by Jaffe, 679 So. 2d 1283, 1285 (Fla. Dist. Court 1986).
61. Hunting World, Inc. v. Super. Ct., 26 Cal. Rptr. 2d 923, 924 (Cal. Ct. App. 1994).

when a debtor fraudulently transferred real property to his wife.[62] Conversely, *Braunston v. Anchorage Woods, Inc.* exhibits an inappropriately filed lis pendens.[63] There, plaintiffs filed a lis pendens against neighbors developing their land to utilize a potential judgment to limit defendants' legal use of their land and that it would affect the title or possession of the use or enjoyment of the property within § 120 of the Civil Practice Act.[64]

On the other hand, identifying an invalid lis pendens is significant because of the consequences it poses consequences. As it was in *Braunston,* the Court of Appeals of New York defined such an improper lis pendens as a claimant having "no right, title or interest in or to the real estate against which it is filed, and where the suit simply concerns some encroachment or wrong perpetrated by defendants on plaintiffs' land."[65] Courts have repeatedly held that a lis pendens recorded in an action not involving title has no effect.[66] Historically, the legislative intent of lis pendens statutes indicated an intent to restrict this type of remedy.[67] This is due to the ease with which a lis pendens can be recorded and its serious consequences.[68] A lis pendens that has been filed clouds the property's title and prevents its transfer until the litigation is solved or the lis pendens is expunged.[69]

In terms of the HBA and MV, MV has improperly created the effect of a lis pendens without a proper lis pendens in the first place. The HBA creates no affirmative action that could trigger an obligation for PO to pay damages until PO decides to list its house with MV.[70] While MV may have a claim to a PO's title if it records the memorandum, it is an improper claim because no colorable dispute between PO and MV under the HBA could exist without PO first appointing MV as its agent.[71] Rather, MV has tried to overleverage itself by using filing a lis pendens as a "collateral means to collect money damages" in the absence of a proper claim against a Property.[72] As stated in the Pennsylvania Attorney General's complaint, "MV's Realty's Notice to Index Lis Pendens states no claim to title of the real estate at issue. Rather, it details an alleged breach of the Homeowner Benefit Agreement that could trigger a homeowner to pay an early termination fee under the contract."[73] Thus, the HBA actively clouds PO's titles without there even being a valid claim against PO's titles, leaving the title in doubt for buyers, lenders, devisees, and heirs.

62. *Id.*
63. Braunston v. Anchorage Woods, Inc., 178 N.E. 2d 717, 718 (N.Y. App. 1961).
64. *Id.*
65. *Id.*
66. Lewis v. Super. Ct., 37 Cal. Rptr. 2d 63, 70 (Cal. Ct. App. 1994).
67. Urez Corp. v. Super. Ct., 235 Cal. Rptr. 837, 839 (Cal. Ct. App. 1987).
68. *Id.*
69. *Id.*
70. Massachusetts Complaint, *supra* note 1, at Exhibit A § B; Pennsylvania Complaint, *supra* note 1, at Exhibit C § B, Exhibit D § B (specifying "should Property Owner decide to market the Property for sale...[,]" not an obligation to do so).
71. *Urez Corp*., 235 Cal. Rptr. at 843.
72. *Id.* at 843; Burnette v. Black, 578 So. 2d 740, 742 (Fla. Ct. App 1991).
73. Pennsylvania Complaint, *supra* note 1, 20.

VI. WHETHER THE HBA CREATES A VALID COVENANT RUNNING WITH THE LAND

MV has tried to strengthen the enforceability of its Agreement with PO by framing it as a covenant running with the land to bind PO's successors during the HBA's 40-year duration.[74]

a. General Framework of Covenants Running with the Land

The common law's standard for enforcing servitudes provides a framework for determining whether the HBA is a valid covenant running with the land.[75] In the early 19th century, contract law was generally only enforceable between original contracting parties, not between their successors in ownership of the land concerned.[76] The general rule of non-assignability allowed parties standing in privity of estate to assign their contract.[77] The English 16th-century *Spencer's Case* established three requirements for a covenant to bind successors in ownership of burdened land, which could be applied to contexts not solely limited to landlord-tenant law.[78] In the 17th-century English case *Tulk v. Moxhay*, a chancery court upheld a covenant enforcing a land use restriction to keep and maintain the gardens and grounds against successor landowners, reasoning that it was persistent "'equity' that bound the covenantor's land even after its transfer to a successor."[79] American courts generally adhere to the principles from *Spencer's Case* and *Tulk v. Moxhay* as a structure for determining whether a covenant should run with the land.[80]

American courts require that, to enforce a covenant against a successor at law for money damages, "[1] the original covenanting parties intended to bind successor owners to the restriction, [2] the restriction 'touched and concerned the land, [3] the original covenanting parties stood in 'privity of estate,' and [4] the successor took the land with notice of the restriction."[81] In enforcing a covenant against a successor as an equitable servitude (e.g., specific performance or an injunction), the privity of estate requirement is omitted.[82] In analyzing whether each requirement has been met, "intent to bind successors" is usually reflected by express language purporting to bind "parties and their 'heirs, successors, and assigns,'" and notice can be met by constructive notice of proper recording in the public land records.[83] The center of covenant disputes more often concerns "'privity of estate'" and "'touch and concern' requirements."[84]

Courts look to the benefits and burdens of a covenant to determine if privity of estate has been satisfied to bind successors, whether or not the covenant is recorded

74. Massachusetts Complaint, *supra* note 1, at Exhibit A §§ 2, 5(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 2, 5(a)–(b), Exhibit D §§ 2, 5(a).
75. R. WILSON FREYERMUTH ET AL., PROPERTY AND LAWYERING 582–86 (3rd ed. 2010).
76. *Id.* at 583.
77. *Id.*
78. *Id.* at 583–84.
79. *Id.* at 585.
80. *Id.*
81. *Id.*
82. *Id.* at 585–86.
83. *Id.* at 586.
84. *Id.*

on the deed.[85] The First Restatement of Property "required both horizontal and vertical privity before a covenantee (CE) or her successor (CE2) could enforce the burden of a covenant against a successor to the covenanter (CR2)."[86]

In *Bremmeyer Excavating, Inc. v. McKenna,* the Washington Court of Appeals invalidated an exclusivity service contract between Bremmeyer Excavating, Inc. and a client after the client sold the property to John McKenna and John Pietromonaco did not use the contractor's services.[87] The Court held that an exclusive contract, whereby Bremmeyer Excavating, Inc. received the exclusive right for five years to perform all hauling of fill material and installation of certain utilities on the subjected property in exchange for the lowest competitive bid obtained by Gerald Parks, did not create horizontal privity of estate between the original contracting parties.[88] The Court reasoned that "the record before this court lacks evidence that the fill contract passed between the original parti o, wh es in conjunction with an interest in land or that the contract relates to coexisting or common property interests and "[a]bsent[89] In other words, the privity of estate between Bremmeyer and Parks was solely a personal pecuniary benefit to Bremmeyer so no horizontal privity existed. Although the prior owner, Parks, stood in vertical privity with the successive buyers, McKenna and Pietromonaco, this covenant was a burden without a benefit to buyers and could not run with the land to successive owners.

Courts look to the substance and not the form of a covenant in determining whether it touches and concerns the land.[90] In *Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank*, the New York Court of Appeals upheld a covenant that touched and concerned the land.[91] Developer, Neponsit Realty Company, filed a covenant purporting to run with the land in the deed of a subdivided parcel for residential lots that would be "devoted to the maintenance of the roads, paths, parks, beach, sewers and such other public purposes as shall from time to time be determined by the party of the first part, its successors or assigns."[92] Neponsit was successful in foreclosing on a lien on land in its development because the covenant was designed as "an affirmative covenant to pay money for use in connection with, but not upon, the land which it is said is subject to the burden of the covenant."[93] The Court reasoned that there is no rigid formula for determining whether a covenant touches and concerns the land but that it was very clear that the covenant here touched and concerned the land.[94] Annual dues paid to the Property Owners' Association met the touch and concern requirement because lot owners' benefit in enjoying a common right to the public land was inseparable from paying dues upon purchasing a lot from Neponsit.[95]

85. *Id.* at 586–87; Cushman & Wakefield of Md., Inc. v. DRV Greentec, LLC, No. 4196860V, 2018 WL 3025859, at *7 (Md. Ct. Spec. App. June 18, 2018).
86. FREYERMUTH ET AL., *supra* note 73, at 588.
87. Bremmeyer Excavating, Inc. v. McKenna, 721 P.2d 567, 568–69 (Wash. Ct. App. 1986).
88. *Id.* at 567–68.
89. *Id.* at 569; FREYERMUTH ET AL., *supra* note 73, at 588–89.
90. *Bremmeyer Excavating, Inc.*, 721 P.2d at 568.
91. Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 798 (N.Y. 1938).
92. *Id.* at 794.
93. *Id.* at 795.
94. *Id.* at 796.
95. *Id.* at 794, 797.

b. Whether Brokerage Commissions Can Run with The Land

Courts have applied the same principles with land to commissions arising out of brokerage contracts purporting to run with the land.[96] Courts have resoundingly upheld brokerage contracts as personal contracts, rendering them not assignable without express assumption to bind a subsequent owner.[97] Applying the traditional test for covenants running with the land provides some certainty for subsequent owners of a home with an HBA attached to its title.[98]

In *Cushman & Wakefield of Maryland, Inc. v. DRV Greentec, LLC*, the Court of Special Appeals of Maryland addressed a subsequent landlord's obligation to pay brokerage commissions because its tenant from the previous owner contracted for a lease renewal option, including a provision that the landlord would pay both the tenant's and landlord's brokerage commission.[99] The original landlord, MGP, had assigned its interest in any future leases of the property and defaulted on its loan.[100] After Bank of America purchased the property at a foreclosure sale, the bank marketed the property for sale, and its offering memorandum stated that the sale was "'subject to a Deed of Lease from [MGP] Landlord, to [TRAX], dated July 15, 2010.'"[101] On January 20, 2012, DRV purchased the property from Bank of America, and both parties "signed the Assignment and Assumptions of Tenant Lease and Contracts . . ." stating that the assignee "'agrees to perform all of the covenants, agreements and obligations under the Lease and Contracts binding on Assignor, or Real Property, Improvements, or Personal Property . . . .'"[102] In March 2015, DRV's tenant, TRAX, renewed its tenancy with the broker, Sloan, based on the terms and conditions in Section 32 of the lease that TRAX had entered into with MGP.[103] Brokers Cushman and Sloan requested the subsequent owners, DRV, to pay renewal brokerage commissions of $617,928.50 and $463,446.37 but met DRV's refusal.[104]

Affirmed by the Court of Appeals of Maryland, the Special Court of Special Appeal's first pertinent conclusion was that a party assuming a lease must expressly agree to assume the personal obligations of the seller to be bound.[105] The Court reasoned that, when DRV purchased the property from the bank, it signed an assignment agreement from the bank, not MGP, so no valid assignment occurred.[106] The Court relied on language from *Spivak v. Madison-54th Realty Co.* where a broker unsuccessfully sought to recover a commission from a property owner that accepted the assignment of a lease because the lease's language was too indefinite to create a promise, making it unable to hold a subsequent property owner liable for a brokerage commission upon the tenant's exercise of an option to extend its lease.

---

96. Cushman & Wakefield of Md., Inc. v. DRV Greentec, LLC, No. 4196860V, 2018 WL 3025859, at *7 (Md. Ct. Spec. App. June 18, 2018).
97. *Id.* at *6; Blasser v. Cass, 314 S.W.2d 807, 809 (Tex. 1958).
98. *Cushman & Wakefield of Md., Inc.,* 2018 WL 3025859 at *6. *See also supra* Part IV(b).
99. *Cushman & Wakefield of Md., Inc.,* 2018 WL 3025859 at *2.
100. *Id.*
101. *Id.*
102. *Id.* at *3.
103. *Id.* at *1, *3.
104. *Id.*
105. Cushman & Wakefield of Md., Inc. v. DRV Greentec, LLC, 203 A.3d 835, 840 (Md. 2019), *aff'g*, 2018 WL 3025859 (Md. Ct. Spec. App. June 18, 2018).
106. *Cushman & Wakefield of Md., Inc.,* 2018 WL 3025859 at *6.

[107] Furthermore, the Court held that taking title "subject to" a lease is insufficient to constitute an express assumption of a personal covenant in a lease.[108] Relying on precedent, the Court reasoned that a subsequent owner's assumption of "all terms, covenants, and conditions of the leases" has been held as insufficient to constitute a covenant to pay a brokerage commission.[109] Consistent with characterizing brokerage commissions as personal, the Court argued that a party assuming a lease must expressly agree to assume this personal obligation of the seller for it to be bound to the agreement (as with mortgages).[110] Because the purchase and sale contract between the bank and DRV did not contain a reference to DRV's assumption of any liability for a renewal commission, the renewal commission could not be enforced against DRV.[111]

The Court in *Cushman & Wakefield* provided further clarification that contracts that are personal, such as brokerage contracts, do not touch and concern the land.[112] The Court explained that covenants, such as paying rent, taxes, keeping mortgaged property insured, repairing, rebuilding, or even maintaining property, affect the obligations, use, and enjoyment of land.[113] The Court distinguished between these aforementioned valid covenants that easily touch and concern the land with brokerage commissions that are: (1) separate from a renewal contract; and (2) "a personal obligation between MGP and the former landlord and appellants."[114] The Court further argued that the personal nature of brokerage contracts prevents them from encumbering property that they are purportedly assigned to and that "the broker commission does not affect the title to or the possession, use, or enjoyment of the property."[115] Thus, providing a reason for construing that the renewal contract's brokerage fee commission was unenforceable against subsequent owners.[116]

In *Blasser v. Cass*, the Supreme Court of Texas held that a real estate agent could not recover a renewal commission for renewal leases concerning property that the broker's client sold to a subsequent owner.[117] The new buyer, Blasser, had not signed the agreement that would have made him liable to the broker, Cass, for renewal commissions.[118] Cass was to receive commissions for renewals of two leases negotiated between two groups of two parties.[119] Meyer, Cass's client, agreed to pay a commission for negotiating a lease.[120] Any options granted by the lessee would obligate Meyer to pay an additional commission on all renewals if a lease term was shorter than five years.[121] This contract would bind Meyer, his assigns, successors, and heirs to the agent's commissions.[122] The Court argued that land "should be subject to ready sale and lease" and as "an article of commerce . . .

107. *Id.* at *6.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id* at *6, *7.
112. *Id.* at *7.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. Blasser v. Cass, 314 S.W.2d 807, 809 (Tex. 1958).
118. *Id.* at 808.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

burden[ing] lands with personal covenants would be to hamper and impede real estate transactions to the detriment of owners, purchasers, and agents."[123] The Court noted that land is socially beneficial, and, therefore, burdens limiting its use or obligations enforcing payment "for benefits received in its use" are undesirable.[124] The Court contended that for a burden to be a validly running promise on the land, it must have a compensating advantage preventing it from "being on the whole a deterrent to land use and development. . . . "[125] Hence, the brokerage commissions were personal covenants that required the Blassers to assume the payment of lease renewal commissions to incur liability to Cass, which did not occur.[126]

i. Whether the HBA Satisfies Intent

The HBA's language that "obligations under the Agreement are covenants running with the land to bind successors during the Agreement's term" would satisfy the intent requirement of a valid covenant to run with the land.[127] Paragraph 5(a) of the HBA stating that the Agreement "shall bind future successors in interest to title to the Property" is further evidence of MV's intent to cloud PO's title.[128] As previously discussed, even HBAs without explicit language specifying intent still convey a similar message.[129]

ii. Whether the HBA Satisfies Notice

The HBA fully satisfies the notice requirement, either through actual or constructive notice.[130] Each HBA being nearly identical, as indicated in Paragraph 5(b) of Exhibit D in the Pennsylvania complaint, state "[u]pon Company's request from time to time, Property Owner shall provide Company with a written certificate confirming the existence of this Agreement and that this Agreement remains in full force and effect."[131] This is evinced by MV properly recording their covenants in the public land records, which would further strengthen their case for meeting this requirement for a covenant to run with the land.[132] Furthermore, this conclusion is allegedly supported by a Florida homeowner who entered into an HBA with MV and alleged that MV never sent her a copy of her signed contract.[133] This Florida homeowner also claimed to have never seen certain pages included in MV's

123. *Id.* at 809.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 808–809; Cushman & Wakefield of Md., Inc. v. DRV Greentec, LLC, No. 4196860V, 2018 WL 3025859, at *7 (Md. Ct. Spec. App. June 18, 2018). FREYERMUTH ET AL., *supra* note 73, at 586.
128. FREYERMUTH ET AL., *supra* note 73, at 586; Massachusetts Complaint, *supra* note 1, at Exhibit A § 5(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 5(a).
129. Massachusetts Complaint, *supra* note 1, at Exhibit A §§ 2, 5(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 2, 5(a)–(b), Exhibit D §§ 2, 5(a).
130. Massachusetts Complaint, *supra* note 1, at Exhibit A § 5(b); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 5(b), Exhibit D, § 5(b); FREYERMUTH ET AL., *supra* note 73, at 586.
131. Massachusetts Complaint, *supra* note 1, at Exhibit A § 5(b); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 5(b) (giving MV the right to obtain a "recordable amendment to the document confirming the existence of this Agreement[.]"); Pennsylvania Complaint, *supra* note 1, at Exhibit D § 5(b).
132. Massachusetts Complaint, *supra* note 1, at Exhibit A § 5(b); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 5(b), Exhibit D § 5(b).
133. Ulrich, *supra* note 3.

Agreement when she signed it.[134] A complaint filed by the Commonwealth of Pennsylvania asserts that MV misled and omitted material facts from its Agreement when describing the HBA to Pennsylvania homeowners over the telephone and on MV's website.[135]

c. Where the HBA Satisfies Privity of Estate

The HBA does not satisfy any privity of estate between MV and successive parties to it.[136] In the HBA's context, as in *Bremmeyer*, there is no horizontal privity between MV and PO once PO has appointed MV as its agent because the benefit between MV and PO is solely pecuniary to MV.[137] Neither is there a successive interest in PO's land upon appointing MV as his or her agent.[138] While vertical privity between the original PO to the HBA would be established upon the transfer or death of PO since they would be successive parties in interest of an entire estate, it would be immaterial without horizontal privity between the original PO and MV.[139]

MV may argue that horizontal privity exists if PO appoints MV as its agent, since the mutual interests would consist of MV receiving a brokerage commission in exchange for providing PO brokerage services.[140] However, the Court in *Sonoma Dev., Inc. v. Miller* confirmed that horizontal privity is satisfied when "the covenant [is] part of a transaction that also includes the transfer of an interest in land that is either benefitted or burdened by the covenant."[141] The HBA does not validly transfer an interest in PO's land to MV because there is no exchange in interests in PO's land between PO and MV during any time of the HBA that has any logical connection to the parties' use and enjoyment of the land.[142] While MV may argue that its property interest constitutes a lien secured against the Property if PO defaults, the language in § 5(a) of the HBA is not adequately clear whether it creates a lien

134. *Id.*; Complaint at 19, Florida v. MV Realty PBC, LLC, No. 22-CA-009958 (Fla. Cir. Ct. 2022); (some consumers claim they waited months to receive a copy of the HBA and others claimed to never received a copy until they requested one. MV's failure to provide a copy of the HBA at its execution severely interfered PO's ability to exercise their contractual right to cancel within 3 days).
135. Pennsylvania Complaint, *supra* note 1, at 11.
136. Massachusetts Complaint, *supra* note 1, at Exhibit A §§ B, 1(a), 3(a)–(c); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ B, 1(a), 3(a)–(c), Exhibit D §§ B, 1(a), 3(a)–(c); Bremmeyer Excavating, Inc. v. McKenna, 721 P.2d 567, 568 (Wash. App. Ct. 1986); FREYERMUTH ET AL., *supra* note 73, at 588.
137. FREYERMUTH ET AL., *supra* note 73, at 588.
138. Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 797 (N.Y. 1938). (as it was in *Neponsit* when the grantor required the grantee of the land to pay for common areas that the grantee has an appurtenant easement or right of enjoyment); Columbia Club, Inc. v. Am. Fletcher Realty Corp., 720 N.E.2d 411, 416, 422 (Ind. Ct. App. 1999) (concluding that a property owner who granted an easement to the owner of an adjacent property received reimbursement for damages arising from construction of a building and parking garage were successors-in-interest to the property on which the construction occurred. The covenant to reimburse and the grant of the easement were in the same document, thus, the agreement was a covenant made in the context of a transfer to owners of the construction site and the indemnification provision thus ran with the land).
139. FREYERMUTH ET AL., *supra* note 73, at 588 (vertical privity focuses upon the succession of interests of the original covenanting parties, requiring the successive owner to succeed the entire estate of the predecessor).
140. *Id.*
141. Sonoma Dev., Inc. v. Miller, 515 S.E.2d 577, 580 (Va. 1999).
142. *Columbia Club, Inc.*, 720 N.E.2d at 419.

sufficient to secure all sums due under the HBA; neither does § 5(a) define what a defaulting event is.[143]

d. Whether the HBA Satisfies Touch and Concern

The HBA does not satisfy the touch and concern standard primarily because it is a personal pecuniary interest solely for the benefit of MV.[144] This is supported by the Court in *Wharton Assoc., Inc. v. Cont'l Indus. Capital LLC*, where it stated that "'[t]here is no question that [a] brokerage agreement is not a covenant running with the land.'"[145]

A covenant legitimately touching and concerning the land must appreciably affect the title or "possession, use, or enjoyment of the property."[146] Like the Court's conclusion in *Cushman & Wakefield* that brokerage commissions concerning a lease do not run with the land, the HBA similarly reflects a personal obligation that does not encumber the property.[147] Brokerage contracts do not create mutual benefits and burdens between the broker and PO; thus, it bears no relationship to PO's possession, use, or enjoyment of the Property.[148] The HBA's most serious legal obligation is a potential, one-sided financial benefit to MV and a potential financial burden overhanging PO or its successor.[149] The Court's reasoning in *Blasser* supports the rationale behind construing brokerage covenants as personal and undesirable burdens to run with the land.[150] Enforcing an HBA on PO's successors would constitute a burden on a highly important "article of commerce[,]" land, potentially impeding the successor owner's choice to alienate his or her land to potential purchasers if the forty-year contractual period has not yet expired.[151] MV's HBA undeniably hampers the "social interest in the utilization of land," adversely burdening ownership for no mutually advantageous reason besides serving a clear and easily calculable profit motive to collect a fee from homeowners who breach their HBA or an assignee who does not want to be bound to it.[152] As of 2018, the median duration of homeownership is thirteen years across the nation.[153] Thus, MV has created a burden attached to land that has no easily identifiable benefit to PO but a substantial burden on its clients who have entered into HBAs.[154] Individuals who have entered into HBAs are restricted from engaging, hiring, or employing any

143. Massachusetts Complaint, *supra* note 1, at Exhibit A § 5(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 5(a), Exhibit D § 5(a); Farrey v. Sanderfoot, 500 U.S. 291, 296 (1991).
144. Cushman & Wakefield of Md, Inc. v. DRV Greentec, LLC, No. 0369, 2018 WL 3025859, at *6 (Md. Ct. Spec. App. June 18, 2018).
145. Ass'n, Inc. v. Cont'l Indus. Capital LLC, 29 N.Y.S.3d 717, 719 (N.Y. App. Div. 2016).
146. *Cushman & Wakefield of Md., Inc.*, 2018 WL 3025859 at *7.
147. *Id.*
148. *Id.*
149. Massachusetts Complaint, *supra* note 1, at Exhibit A §§ 1 (a), 5(b); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 1(a), 5(b), Exhibit D §§ 1(a), 5(b); Farrey v. Sanderfoot, 500 U.S. 291, 296 (1991). *See also* Pennsylvania Complaint, *supra* note 1, at 20–21.
150. Blasser v. Cass, 314 S.W.2d 807, 808–09 (Tex. 1958).
151. *Id.* at 808; Massachusetts Complaint, *supra* note 1, at Exhibit A § 1(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 1(a), Exhibit D § 1(a).
152. *Blasser*, 314 S.W.2d at 809.
153. Nadia Evangelou, *How Long Do Homeowners Stay in Their Homes?* NAR NAT'L ECONOMISTS' OUTLOOK, (Jan. 8, 2020), https://www.nar.realtor/blogs/economists-outlook/how-long-do-homeowners-stay-in-their-homes.
154. Massachusetts Complaint, *supra* note 1, at Exhibit A § 1 (a); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 1 (a), Exhibit D § 1 (a).

other real estate broker or sales agent to sell or list their Property, a choice that a reasonable homeowner may desire within forty years of entering into any brokerage contract.[155]

Furthermore, an assignee of PO could not effectively assume the HBA because of the document's language in § 5(a) and § 3(c)(i)-(ii) of the HBA filed in the Massachusetts complaint and the HBA in Exhibit C of the Pennsylvania complaint.[156] The Court's reasoning in *Cushman & Wakefield* that the lease's language "'all terms, covenants, and conditions of the leases'" were insufficient to establish an assumption of a covenant to pay a brokerage commission is strikingly similar to the HBA's sweeping and imprecise language because the HBA does also not explicitly identify the obligations that the assignee owes to PO (e.g., § 1(a), "Property owner shall not engage, hire, or employ another real estate broker or sales agent to sell or list the Property as "for sale by owner").[157]

VII. CONCLUSION

MV runs afoul of contract law principles by seeking a brokerage fee before taking significant steps in fulfilling a broker's duties and enforcing its contract against successors who choose not to assume the HBA. MV has also tried to circumvent property law principles by recording its HBA in the land records to earn a profit from every breaching homeowner or successor—traditional principles for covenants to run with the land can grind the HBA to a halt for flagrant violations of these principles. HBAs put non-sophisticated homeowners in high-stakes precarious situations where they may be unaware of the obligation they are contracting for and could face financial devastation during the HBA's forty-year duration. Thus, the HBA is unenforceable against successors to the homeowner.

155. Massachusetts Complaint, *supra* note 1, at Exhibit A § 1 (a); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 1 (a), Exhibit D § 1 (a).
156. Massachusetts Complaint, *supra* note 1, at Exhibit A §§ 3 (c)(i)–(ii), 5(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C §§ 3 (c)(i)–(ii), 5(a), Exhibit D, §§ 3(c), 5(a).
157. Massachusetts Complaint, *supra* note 1, at Exhibit A § 1(a); Pennsylvania Complaint, *supra* note 1, at Exhibit C § 1(a), Exhibit D § 1(a); Cushman & Wakefield of Md, Inc. v. DRV Greentec, LLC, No. 0369, 2018 WL 3025859, at *6 (Md. Ct. Spec. App. June 18, 2018).