

Buyer agency contracts riddled with 'unfair' terms, CFA declares

The Consumer Federation of America, a watchdog group, examined 43 contracts from 37 states, most from state or local Realtor associations, and found practices it believes worthy of scrutiny.

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[Buyer representation agreements](#) will become more common in the wake of a [multibillion-dollar verdict](#) in an [antitrust commission](#) case known as [Sitzer | Burnett](#) — but examples of such contracts are riddled with “unfair provisions” that favor agents and brokers, according to a scathing report released Tuesday.

The report by the Consumer Federation of America — “[Required Buyer Agency Contracts: Impacts on Home Buyers](#)” — examined 43 such contracts from 37 states, most issued by state or local Realtor associations. The watchdog found “unfair practices” in the contracts, advised homebuyers to take precautions before signing them and invited regulators to scrutinize their language.

“Buyer agency contracts have the potential to protect homebuyers but the way most are written, protect only agents and their brokers,” said Stephen Brobeck, a CFA senior fellow and the report’s author, in a statement.

“If buyer brokers refuse to improve unfair contract provisions, buyers should consider hiring an attorney and working directly with listing agents.”

According to a CFA press release, these “unfair” provisions include:

- charging “unreasonable” fees, many of which are levied on top of and not credited to commissions, sometimes referred to as administrative, transaction, or regulatory compliance fees
- requiring acceptance of dual agency (where an agent represents both buyer and seller without a fiduciary duty to the buyer or to either party) or transaction brokerage (where an agent does not have fiduciary duty to either party),
- not explaining how conflicts of interest involving other buyer clients are resolved (for instance, if they’re interested in the same property),
- limiting remedies for buyers with complaints, including prohibiting litigation or trial by judge or jury in favor of mediation or arbitration and limiting damages awards to the amount of the agent’s compensation, which CFA says may fail to discourage “egregious conduct”
- pre-filling blanks on terms such as commission rate and length of contract, which can discourage negotiation of those terms
- allowing buyer agents to collect commissions from both their buyer clients and from homesellers

Last year, 41 percent of homebuyers surveyed by the National Association of Realtors said they had signed a buyer agency agreement — a figure that CFA says is likely to rise in the future in the wake of [ever-multiplying commission lawsuits](#) targeting how agents are paid and more and more states requiring the contracts. The nonprofit found at least 13 states currently require them.

“The important point is that most of these state requirements only require a contract but do not specify what the agreement must contain,” the report said.

“Moreover, the industry is given great leeway in writing the contracts, which state Realtor associations typically do, then give agencies and brokers the ability to modify them. Accordingly, while the contracts must conform to state laws such as those on agency and confidentiality, these agreements are written to benefit agencies and brokers.”

“The class action litigation has set in motion events that could be highly beneficial to homebuyers,” Brobeck added. “However, these benefits would likely be severely curtailed if buyer contracts do not receive close scrutiny and are improved.”

According to the report, provisions that allow buyer agents to continue to contact listing agents and ask for additional compensation from sellers beyond what is negotiated with buyers would harm consumers by keeping the current commission structure and rate levels in place. This practice should therefore be prohibited by the courts in any settlements of class-action lawsuits, according to the report.

“Buyer agents could continue to steer clients to properties and their listing agents that offer these rates,” the report said.

“Listing agents, most of whom also represent buyers as well as sellers, could continue to persuade their clients that today’s 2.5 or 3.0 percent commissions were normal and would incentivize buyer agents to sell their properties. Consequently, despite efforts by buyers to negotiate buyer agent commissions, agent commissions would still effectively be set by the industry.”

The Realtor Code Of Ethics’ Article 7 discourages accepting compensation from more than one party but still allows agents to do so with informed consent, the report notes.

“It will be fairly easy for buyer agents to obtain consent from buyers for an additional seller payment if in fact buyers are even aware that this provision is in their contract,” Brobeck said.

Most current buyer agency agreements allow the buyer agent to retain the difference if the seller offers a larger buyer agent commission than that negotiated between the buyer and the buyer agent, according to the report.

“For example, if a buyer negotiates a commission rate of two percent with their buyer agent and the seller agrees to provide three percent, the buyer agent can pocket the one percent difference instead of allowing the buyer to use this one percent to help cover sale costs,” the report said.

“This provision has the potential to inflate seller or buyer costs. The seller either has to pay the one percent themselves or add it to the sale price, increasing buyer costs.”

The report advised buyers to interview agents and request buyer agency contracts before the interview so that they have time to read, evaluate and negotiate the contract’s terms regarding agent compensation, exclusivity, contract length, and potential conflicts of interest and perhaps seek legal advice.

“A buyer should be prepared to walk away from an unfair contract or inflexible agent,” the report said.

“As buyer contracts are used with greater frequency, buyers are likely to demand more from these contracts, and an increasing number of agents and their brokers are likely to grow more flexible about agreeing to customer requests.

“Should a buyer ever work with a buyer agent without a contract? It might be wiser to work directly with a listing agent who is a dual agent or transaction broker but also hire an attorney to protect one’s interests.”

If working with a listing agent, the report advises insisting that the agent act as a facilitator that cannot lawfully favor the seller.

Regarding conflicts of interest, the report says, “Buyers should only agree to loss of true representation if they have evaluated a number of properties and concluded that the one listed by the buyer agent or their broker is the one they want.”

Regarding compensation, the buyer should try to negotiate down the buyer agent commission from the typical 2.5 to 3 percent charged in their area, question any additional fees, and ask whether the buyer agent will be seeking compensation from the listing agent and/or seller above the commission agreed to with the buyer, according to the report.

“This additional compensation might tempt the buyer agent to steer the buyer to listings with that compensation,” the report said. “Buyers should also make certain they know what seller concessions are available from a seller before submitting an offer on the property.”

The report suggests that buyers consider paying their agent a retainer fee.

“This fee provides the buyer agent some compensation if they show many properties that the buyer decides not to purchase,” the report said.

“Buyers should make sure the fee is reasonable and request that it be credited to the commission if the sale occurs.”

CFA also counseled buyers to refuse to sign any contract that prevents them from seeking court remedies to resolve complaints.

“The class action lawsuits have persuaded industry leaders that buyer agency contracts are needed to protect the industry from future litigation,” Brobeck said.

“Regulators including state attorneys general should review these contracts to ensure that consumers, as well as agents and brokers, are protected by them.”