

## **Michael Ketchmark: Every move you make, we'll be watching you**

In a phone interview, lead plaintiffs' counsel Michael Ketchmark weighed in on the consequences of violating the NAR settlement, Zillow's business model, and the 'monster case' that remains

by [Andrea V. Brambila](#), Inman News August 19, 2024

Attorneys for homeseller plaintiffs in multiple antitrust cases will be keeping a close eye this week on how the real estate industry rolls out business practice changes to comply with the National Association of Realtors' proposed settlement this week — and looking to make examples out of brokers and multiple listing services who violate the deal.

That's according to Michael Ketchmark of Ketchmark & McCreight, lead plaintiffs' counsel for a case known as Sitzler | Burnett, the only suit among about two dozen filed nationwide that has [gone to trial](#). That suit resulted in a [multibillion-dollar jury verdict](#) in favor of the plaintiffs and against NAR and major real estate franchisors Keller Williams, Anywhere, RE/MAX and HomeServices of America.

In March, NAR filed a proposed settlement with the court, agreeing to [pay \\$418 million](#) and institute MLS rule changes, including a prohibition on listing brokers making offers of compensation to buyer brokers on MLSs, sellers no longer being required to offer buyer-broker compensation, and a requirement that brokers and agents sign [contracts with buyers](#) they are working with before a buyer tours a home.

NAR gave MLSs until Aug. 17 to implement those rule changes. Prior to the deadline, Inman caught up with Ketchmark to ask what his team is doing to prepare for the changes.

In a phone interview, he told Inman what plaintiffs' attorneys would do against those seeking to go around the settlement's provisions, responded to requests to sanction different interpretations of the deal's business practice changes, set out his hopes for how the deal would affect Zillow's referral-based business model, and revealed the "monster case" that remains if the NAR settlement receives final approval in November.

**Inman: We're gearing up for this Aug. 17 deadline and wanted to check in to see what you're doing on that end. What is it that you have to get done by that deadline, if anything?**

**Michael Ketchmark:** We've been monitoring what's been happening in the industry with a lot of these webinars and training programs, just seeing how people are interpreting this and what their intention is. If anyone thinks they're going to be able to avoid the application of this settlement agreement and the law by creating some new forms or hiding this cooperation on new websites, they're wrong. If we get any sense that people or corporations are doing that out there as a way around this, we plan on taking swift legal action.

But from our standpoint, everything's just been set in motion, and we're sitting back **waiting for it to take effect**. We believe it's going to take a while for the free market to adjust to this and for us to see commissions start coming down. But we fully expect that's what's going to happen.

**What are you seeing in these webinars and forms that's concerning?**

There's a huge desire with some of these large corporate brokers to continue this because there are literally tens of billions of dollars that have been fleeced out of the pockets of homeowners, and there's a hope that they can continue to do it, but they're not going to be able to. The agents and brokers we're talking to understand this.

We're starting to get reports back from agents and brokers in large cities that they're already seeing the commissions are starting to drop. I remain hopeful that that's exactly what we're going to see happen, but it's going to take a while. It's been reported as this seismic shift in the real estate industry; the biggest thing to happen in centuries. It's not something that just changes overnight. It's going to take a little bit of time for the free market to adjust to this, but it's going to happen.

**In what ways do you think they're trying to still continue?**

People were talking about trying to set up third-party websites for commission-sharing or that they could create new kinds of forms that they have that they don't put on the MLS, or kind of do things behind the scenes. The rubber is about ready to hit the road... and really that's what's going to be important to us. It's not what people are talking about, what might happen, but what does, in fact, happen.

There just needs to be a loud and clear warning to everyone who's out there, that they need to be careful because it's not only going to be the settlement agreement that is going to have the force of law, but, as anyone can imagine, the Department of Justice is very interested in seeing how this is going to play out, and we fully expect the DOJ to be actively involved in shutting down any attempts to create new legal conspiracies.

**I'll get back to that. In terms of the forms you mentioned, are there any provisions you're seeing that you're concerned about?**

Right now, I don't have any concerns about what I've seen out there or what I've heard, but I hesitate to take any position on what actual forms are going to be there because I've seen so many different drafts. But you can imagine, there's all of these different local MLSs with all of these competing entities that are out there.

Ultimately what's going to matter to us are the forms that are actually used and replaced with, not what people are saying may be done or drafts of the ones that are done. **When this comes into effect**, if there are MLSs are out there that are using forms that we think are in violation of the agreement or that violate the law, we're going to take swift action.

**The [California Association of Realtors](#) took out broker-to-broker compensation on their forms. Is that an example of something you would like to see? Or is there still something concerning about their forms?**

The back-and-forth that we've seen with some of these large associations, like provisions being in there, provisions being taken out, those are the types of things that I'm talking about. But until I actually see the new forms that are being used and the new documentation that's being used, it would be irresponsible for me to comment in a vacuum because I have no idea if what I've heard about or what I've seen reported is ultimately what's going to be there.

I think that there's a large desire in the industry to have the plaintiffs' attorney somehow bless this material or bless this information. We're not going to do that until we see how it's written and how it's used in the real world. But if we find things that we think are in violation of the agreement, we're going to take action.

**You mentioned different interpretations of the new rules. What interpretations are you seeing?**

Not a day goes by where somebody doesn't send me some type of an Instagram or a Tiktok or a Facebook page or something on X or on social media where someone's saying, 'Hey, this means this,' or 'This means that,' and that's what I'm talking about. There's a lot of that.

There have been some forces out there that have created some uncertainty as to what the requirements are, but the requirements are real straightforward: You can no longer use the MLS as a vehicle for sharing cooperation or for fixing prices. If anyone thinks that they can get around that they're wrong. If we see anything out there where there's an attempt to violate that fundamental premise of this settlement agreement, that's what we're going to take action against.

**I don't know if you saw [an article](#) I wrote about our Inman Connect conference where the panelists on stage were saying, 'Don't make pre-emptive offers of compensation. Just say your seller will consider all requests and wait for the buyer to put it in their purchase offer.' Then somebody in the audience said, 'Hey, are we doing it wrong? Because our buyer agents are calling the listing agents to ask what the sellers are offering.' So, is that wrong?**

We're not going to weigh in on these hypothetical questions. My involvement in this for the last five years has told me that the resolution of the right or wrong is so fact-dependent upon what actually is happening.

I know when the plaintiffs' attorneys say something, that the industry can rely upon that and they can use that or they can think that that guides their behavior, but the guiding behavior that they need to be worried about is they can't violate the antitrust laws. They can't use the MLS or those vehicles as a way for announcing that they're sharing cooperation or setting the commissions, and if anyone's doing that, it's going to be a problem.

Whether or not specific behavior violates the terms of the settlement agreement is going to depend upon the circumstances of when it happens. We're going to call balls and strikes when the ball crosses the plate, not ahead of time.

**So pre-emptive offers of compensation are allowed under the settlement? If the seller decides, 'I do want to offer to the buyer's agent and I want you to not put it in the MLS, but you can put it on a flyer for my house or on the listing broker's website or anywhere else'?**

I don't know. I'd have to look at what's being done, how it's being done, and apply it to the terms of the settlement agreement. I'm not going to just say yes or no on a question like that. It's going to be dependent upon the facts.

**The settlement says they're not prohibited outside of the MLS and I just want to know if that means they're allowed.**

Even if something's not prohibited, it doesn't mean that the way that they're doing it is okay. If a seller is being coerced or forced into making an offer of cooperation because of fear of steering, there's all kinds of factors that could go into creating some type of illegal sharing provision. It's just gonna depend upon the facts and how it plays out.

**You mentioned you're going to be looking at what happens. Are you doing anything this week or next in terms of of prepping for this deadline or deciding how you're going to police it?**

Sure. There's a team of lawyers from all of the different law firms that are involved in this. Several plaintiffs' law firms with entire teams of attorneys. We have weekly calls, and we are taking very aggressive steps to prepare for the launch of this. We plan on staying on top of it as it rolls out.

**Can you elaborate on the steps you're taking?**

No, other than I would tell the industry that they better mind their P's and Q's and comply with the law because this is a hard-fought-for change. [A] tremendous amount of effort and energy went to obtain this on behalf of the homeowners and sellers in our country, and we're going to make sure that it's carried out the way it needs to be carried out.

I don't think there should be any doubt in the industry of our sincerity when we say that's what we're going to do. But I'm not one to let other people know what our preparation is, other than we're preparing.

**How soon do you think we'll see? Will that preparation be visible in some way?**

Hopefully, the results will speak for themselves as we start to see these sales go through and as we start seeing commissions dropping, as we start to see the free market work and disrupters come in and change the industry. It will be more the fruits of our labor that we'll see, instead of the actual labor.

**Will there be any immediate repercussions for MLSs or brokers who break the rules?**

Yeah. If anyone's breaking the rules or violating the agreement, we're going to look for the opportunity to make examples out of anyone who's playing fast and loose with the law. The last thing that they're going to want to be is the person that does that or the corporation does that. I'm happy to have somebody serve as an example of what happens to people who violate our antitrust laws.

Hopefully, what's going to happen is it's not going to happen. Hopefully, we're going to find that these MLSs start complying. I've always maintained, and I really believe, that it's in the best interest of the real estate industry and it's the best interest of these brokers to compete in the free market. When they do that, I think that the strong brokers who are bringing quality services and doing that, either on behalf of buyers or sellers, that they're going to be rewarded and they're going to be paid.

People have always been willing to pay for quality service and quality care. If you're buying a home, they're willing to pay for that. If a seller wants to negotiate with their agent in the free market, they can do so. Let's just let the free market work. Hopefully, in the end, I think that the industry is going to realize this is a good thing for the industry.

**You mentioned potentially making an example of brokers or MLSs who are breaking the rules. What kind of actions would you take?**

Litigation. Lawsuits; court orders; injunctions; get the Department of Justice involved, if they're willing to do so. What people need to realize is that antitrust laws, they're not just civil, but they're also criminal in nature, and at some point, this behavior can cross over into the criminal realm.

**Would you have to do anything special in order to have it cross over into the criminal realm?**

We would refer it to prosecutors if we believe that there's something illegal, criminally, that's happening.

**So the prosecutor would have to file something as a criminal case?**

Yeah, that's not something we could do.

**What do you anticipate the DOJ would do?**

I don't know. I would never presume to speak for the Department of Justice, and I would never make predictions.

But I have met with a lot of the high-level folks at the Department of Justice, as well as frontline attorneys, and this is a dedicated group of people who've given their lives to the enforcement of these laws. They really, truly want to bring about change here for the American homeowners. I fully expect that they're going to be prepared to take actions even unrelated to the settlement, but change is going to come here, whether people want it to or not.

**You think they're going to be watching?**

I would imagine so. But I'm not basing that on any inside information. It's just my belief.

**To go back to the actions you might potentially take if somebody's violating this. Is there going to be some sort of grace period or like, a week later, if they're breaking the rules, then-**

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Depends upon the severity of it. We have a whole arsenal of things we could do, as simple as sending out an email, making a phone call, sending a cease-and-desist letter, to filing a lawsuit. It just depends upon how severe the situation we believe is and what the appropriate response is.

But, by and large, my experience with the industry since the settlement came about is it is good, decent, hardworking men and women who truly care about doing the right thing. I've always maintained that the real estate agents have been the victims of what's happened here at a higher corporate level, and large corporate brokers are the ones who set this up and pulled a lot of this money out of the pockets of the local real estate agents.

That's what people forget, is that the vast majority of this money was stripped away from the local agents and was used by these large corporate brokers and companies like Zillow and others.

My belief is, when it returns to the local brokers and returns to local control, that it's going to be better. I truly believe that these local agents are going to do the right thing, and they're not sitting

around trying to find out ways to violate the laws. They just need to be skeptical if you have large corporations coming in and pushing forms on them or pushing documents on them that are going to expose them to problems.

**When you say the vast majority of these funds have been stripped away from the agents, what exactly do you mean?**

I saw how this NAR rule was being used by companies like Zillow and others to say, 'Hey, if you get a referral, you have to pay back a huge portion of the commissions back to these corporations' and things like that. It really was being taken out of the pockets of the local agents.

**You haven't sued Zillow, as far as I know.**

Nope. Our belief is that the changes that are taking place here are going to stop that. What Zillow was doing was going in there and using these local MLS rules, and they set their business model up on top of this illegal conspiracy. They benefited from this illegal conspiracy. Now hopefully we just cut the legs out from under that.

**You mean for them to not be able to get referral fees from buyer agents?**

Yeah. The whole system was set up so that commissions were being established at 6 percent, it was being split, and then the entire network was set up in order to benefit from that. I think this is disrupting all that and changing all that.

**Have you had any issues with the settlement process so far?**

No. There's a lot of work associated with it. There's a lot of hard effort that's been put in by attorneys on all sides and and my dealings so far with all of the NAR attorneys and all the attorneys for the large corporate brokers, they've been working hard and trying to do the right thing.

I'm personally excited, and the plaintiffs' attorneys are excited, to see this effect take place and for us to see how it plays out. Ultimately, the goal is to benefit homesellers in America and to bring down the cost of commissions in America. Time's going to tell whether or not that happens or not, but I fully believe that it will.

**How soon do you think it'll happen?**

I think we'll start seeing anecdotal evidence of it relatively quickly. But to me, it'd be interesting to look back in a year and do a comparison. You don't have to shift this very much for it to result in tens of billions of dollars of savings because there's just so much money at stake. It's going to take some patience and some time.

The hardest thing would be to predict exactly how long it's going to take, but there's no question it's going to occur.

**Any updates on brokerages yet to settle?**

No, other than I know that every day I continue to see emails from our team and and new brokers that are settling.

**Dozens have settled, right?**

Oh yeah, a whole host of smaller brokers have reached settlements with us. In the coming months, you're going to see a flood of filings for approvals of those. It just takes a while for all of the process to take place.

**What are the biggest loose ends here still waiting to be tied up in all this litigation?**

The next phase of this litigation after all this is over is going to be our ongoing [case against Berkshire Hathaway Energy](#). That's going to be the monster case. Trial is set for that [in] 2027. It's always off, but into next year you're going to start seeing litigation going on there. Our entire trial team is going to be turning our energy and attention to Berkshire Hathaway Energy and holding them accountable and liable for what's happened here.

**So just because HomeServices settled doesn't mean that Berkshire Hathaway Energy has.**

That's right. In fact, a very significant part of the HomeServices settlement was carving out our lawsuit against Berkshire Hathaway Energy, and allowing us to proceed and go forward against them. That's going to be the massive fight that remains.

**You don't think that will settle anytime soon?**

No. It's our position that Berkshire Hathaway Energy sat on top of this entire conspiracy and benefited from it. HomeServices and all the brokers beneath them benefited from that. They're ultimately responsible and liable for this. We intend to prove that, and if we go to trial on that, the amount of damages will be in the hundreds of billions of dollars.