


NAR SETTLEMENT OBJECTORS DISCUSS OPPOSITION TO POLICY CHANGES

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Trust is the cornerstone of the agent-client relationship, but for some, it has been harder to come by these days due to the endless litigation the industry has been embroiled in.

For Peter Gustis, a Pennsylvania-based REALTOR® at Springer Realty Group, conversations about lawsuits and settlements have been unavoidable as he expresses concern about the impact of the settlement on the reputation of real estate agents.

"I've been as honest as I could be, and now you're saying that technically I'm liable also because now that this is a blanket (settlement), I am also one of the bad actors here," he says.

As such, Gustis often finds himself defending his reputation while educating clients on the lawsuit and the settlement. These concerns pushed Gustis to write a letter formally objecting to the Burnett verdict and subsequent NAR settlement mandates that took effect Aug. 17.

He isn't alone, as the lawsuit garnered opposition from a swath of people who have taken issue with different aspects of the lawsuit and settlement.

Battling perceptions

The aftermath of the Burnett verdict spurred a renewed focus on buyer agency. At the same time, NAR's proposed settlement addresses several issues raised by the existing commission structure and business practices on that side of the transaction.

It also shed light on a large gap between the public's perception and the reality of a buyer broker's value, which has been a topic of debate in the courtroom and among the media.

"A lot of consumers are uninformed," Gustis says. "They believe since they can search online...that they don't need somebody to help them with due diligence, but there's a lot more than just the due diligence."

He also explains that many consumers may think they can rely on portals to guide their home search, but the information can be incorrect, which can complicate their process.

"If a consumer thinks that they don't need due diligence when they're purchasing, they're, in my opinion, misleading themselves," Gustis says. "You're better off having somebody who's educated, knows the job and will ask you what you want and need to help you achieve those goals."

While he acknowledges the possibility (or even likelihood) that there are bad actors in the industry, Gustis disagrees with there being a blanket ruling and settlement that deals with industry-wide changes. He argues that the shifts in business practices and policies could create more problems than it solves.

Industry-wide rule changes took effect Aug. 17. However, there is room for changes as the Department of Justice (DOJ) has until November to approve the final settlement, which leaves plenty of uncertainty surrounding future policy shifts.

Among the shifts in place is the elimination of buy-side commission offers from listing agents on multiple listing services, which Gustis believes will leave the compensation of buyer agents up to the interpretation of the listing agent or seller.

"When fair compensation is not offered to everybody equally, then it leaves it up to a scenario where they may not be treated equally because you're getting different agreements, different things, different communication," he says.

Gustis continues, "When you have fair disclosure, and everyone's treated equally, it doesn't matter who the agent or buyer is. Everybody's getting treated equally. I'm just confused how things are going to get better with changing it to 'we're not going to tell you if you're going to get paid or not.'"

Arturo Gonzalez is another real estate practitioner who took issue with the settlement, picking apart the allegations made by plaintiffs in his own formal objection to the agreement.

Calling out the lawsuit's scrutiny of the existing commission structure, Gonzalez argues that sellers weren't harmed based on how real estate transactions are financed because buyers are typically the ones bringing the money to the table.

"In (the previous) system, the commission for both buyer's and seller's (agents was) built into the structure as it is financed and in this manner it makes the system consumer friendly for the buyer to just come up with the initial down payment and this option has worked for decades," he wrote.

Gonzalez's objection further argues that NAR did not conspire, as plaintiffs and attorneys alleged in the lawsuit. Instead, he notes that the industry "lacked one piece of information" clarifying who pays the commissions.

Rather than having NAR make the sweeping rule changes it has in its settlement, Gonzalez thinks it would have been easier to add the disclosures into the contracts informing buyers that they are paying the commissions.

At the same time, Gonzalez challenges agent steering allegations by drawing parallels to how real estate commissions work with repossessed homes through banks and HUD.

His letter explains how banks and HUD list repossessed homes on MLSs with a real estate agent and how HUD has typically paid up to 5% to the buyer's agent.

"It may seem that this practice of incentivizing agents through a higher commission may be a bad practice, but that's a practice and precedent that has been set by banks and HUD as they have offered up to 5% just to buyer's agent and that's not including the listing agent compensation," Gonzalez wrote.

Based on that argument, Gonzalez claimed that the proposed settlement changes, eliminating buyer broker commission offers on MLSs, would be a "disservice to the seller," who would be unable to use that tool to promote their listing.

Gonzalez did not immediately respond to RISMedia's inquiries for this story.

An alleged money grab

Accusations of price-fixing in the Burnett case—and several other commission-focused litigations—have been a source of ire and rebuke among real estate practitioners for years, as many have called the allegations meritless and misleading to consumers at large.

Anthony Philips, CEO of Las Vegas-based Luxury Real Estate Advisors, is among them, calling the ruling “an astonishing injustice” in a letter of objection to the settlement sent to the courts in April, calling for Judge Stephen R. Bough to vacate his verdict and void the settlement.

Phillips argued that the claims and allegations made against the real estate industry were part of a “sophisticated propaganda campaign” designed to mislead the public with “false statements, half-truths and conflation of economic models.”

While some blame lawsuits like Burnett/Sitzer for the scrutiny and mistrust real estate practitioners have been under, Phillips believes the PropTech sector is also a culprit.

“They made enough noise to get the attention of the Department of Justice, so that they’d go ahead and open up the inquiries, and then they use the fact that the Department of Justice is now doing an investigation as a key point to all the litigation,” Phillips says.

That was impetus for his formal objection to the settlement and lawsuit verdict as he tells RISMedia that he strongly disagrees with disparaging remarks made by the sector against real estate to build up their brands.

Phillips’ letter suggests that that was largely propagated by advocates and industry leaders who were used by plaintiffs to corroborate their allegations and assertions. He specifically calls out Redfin CEO Glenn Kelman and Stephen Brobeck, a senior fellow at the Consumer Federation of America (CFA), lambasting their critiques—and alleged contradictions—of the existing commission structure.

“Then to compound that, you get a bunch of lawyers now that think that we are ripping people off when we charge 4.93%, yet they charge 33%,” he says.

His letter emphasized issues with using commission percentages as a definitive economic measure to determine agent income and calculate alleged damages to class members.

Phillips ultimately claimed that using percentages was meant to blur economic measures.

“In reality, a ‘commission’ should be understood as a specific monetary amount, whereas ‘rates’ and ‘percentages’ represent proportional values or fractions,” Phillips wrote in his letter.

Phillips also criticized the legal fees allocated to the lawyers representing the plaintiffs, pointing out attorney Michael Ketchmark’s “exorbitant” fees, which have yet to receive final approval but will likely reach into the tens of millions.

“This uneven narrative propagation creates a significant imbalance, potentially swaying public opinion and influencing the judicial outcome, thus undermining the fairness and integrity of the legal process,” Phillips wrote.

The letter also claims that Ketchmark’s firm and its co-counsel justified the amounts, stating that the lead plaintiffs agreed to this upfront compensation “similar to real estate listing agreements.

Real estate agents aren’t the only ones who have taken issue with the settlement, and how it has played out. This same sentiment aligns with a mix of objections coming from several class members—recent homesellers—who also formally objected during the spring.

That includes Diane Knizer, a qualified class member in the Burnett lawsuit who sent a handwritten letter in May objecting to the settlement. Specifically, Knizer disagreed with paying attorney fees out of the settlement amount.

“Doing so inflates the settlement amount in the exact same way that the payment of REALTORS® fees out of home sale proceeds wrongly inflates the value of home prices,” she wrote. “The defendants should be required to pay the full settlement amount in addition to attorney fees.”

Knizer believes that the defendants should be responsible for those fees. In a recent interview with RISMedia, she emphasized that by making settlement class members pay the attorney’s fees, NAR would be skirting that liability.

“It’s so obvious that it’s the same profile; it’s the same unfair expense being put upon the settlement class,” she says.

South Carolina resident Cynthia Goralski echoed similar sentiments, stating that attorney fees and costs are too high.

“It just seemed voluminous,” she says. “I understand there are many people involved, but you’re not putting up a separate argument for each person. Everyone has the same thoughts on it. Everyone came in, and everyone purchased or sold a home, so the ones that sold are paying for both sides, and that’s the continuous story for everyone else in that Class Action Act. So you’re not changing it for each individual person. One argument, and it just seems like it was an awful lot of money.”

That was also among the points in an April letter obtained by RISMedia outlining her objections to the settlement. Among her list of points, Goralski indicated that class members weren’t receiving enough relief for the harm suffered while also claiming that plaintiff attorneys were being paid too much.

“What’s going to happen is the attorneys are going to make out very well, and all the other hundreds of thousands of people that bought and sold from that period (won’t),” she says.

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JORDAN GRICE

Jordan Grice is a contributing editor for RISMedia.

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COMMENTS 4



Teresa Overcash 🕒 3 days ago

It would make much more sense to have just put disclosures on all of the forms stating that commission is negotiable, for those few people who did not know this. This may save those consumers a couple grand each, whereas now they are getting 30 bucks from the settlement..

I would also like to remind everyone that a class action lawsuit from the 90s created the situation that they are now suing us for again (The process they now criticize is the process they required that we adhere to after the previous class action lawsuit).

This lawsuit has also misled home sellers and homebuyers. 70% of buyers in my area cannot pay their agent out of pocket, so if we don't find a way to bake their fee into the purchase price, or through buyer concessions, they may skip viewing those homes.

Buyers who insist on going to the listing agent are working with the agent whose job is to get the best price and terms for the seller (not to mention, many times the commission will not be reduced by using the listing agent, because the agent is doing both sides of the transaction, has double the work, and double the liability, and their fee is set up front).. Consumers who think showing a house and filling out a few forms is all that Realtors do, will find out eventually that we do way more than this. Anybody can try to sell their home by owner, but homes listed by professional realtors net the seller 11 to 17% more than they will get selling by owner. Sure, you sold your home on your own, but did you really sell it for top dollar? Buyers,

sure, you can get an attorney to fill out your paperwork and hire an inspector, but that is just the tip of the iceberg of what Realtors do. You simply don't know what you don't know.

I anticipate numerous lawsuits in the future from Buyers who were not told that the agent working for the seller was negotiating against them and from Sellers, whose values plummeted because half of the Buyer pool did not view their home, and they were not told how these changes could negatively impact them.

I have a novel idea, why doesn't the DOJ get together with professionals from the real estate industry and put together a plan of action that truly benefits the consumer, instead of concocting an idea where attorneys can make \$300 million, while the consumer makes pennies, and consumers are ultimately harmed in this new process.

 Reply



Linda Caldwell 3 days ago

Yes!!! 100% Yes!

 Reply



Peter Zams 3 days ago

Excellent post. Sellers that are selling their home themselves get offers lower than the commission that they would have paid their agent. The oldest trick in the book is the sellers buyer states they do not have the money to close on the day of closing while the seller has moved out and needs the proceeds to purchase their next house.

 Reply



buysellrentrealestate 2 days ago

Keep in mind it's business as usual. You can still negotiate your commission with the seller to either pay your comp, the buyer agent comp and/or seller concessions. The goal is to be clear that there has never been a law that specifies how much commission is charged, only a law that specifies that a realtor needs to have a license in order to get compensation. Guidance comes from NAR and local MLS on how commissions are distributed but never guidance on what to charge for a listing. Has anyone ever questioned why a Gucci bag or shoes cost \$30 to make but sell for hundreds or thousands.... or why a steak that you can get at Costco for \$15 costs \$40 to \$50, or a wine that costs \$50 for a bottle of wine costs \$250 at a restaurant – I can go on and on. Do you ever call your Doctor's office and ask them what the final bill is going to be after your visit...no it's always a surprise even after your copay. Have you ever attended a mediation for a settlement – ITS COMPLETE BS!!! and attorneys are getting 20% to 50% of settlement. (ok so let's start at \$1 million and see what they say,,ok so now let's give them a scale from \$900k to \$1 million ok so now \$800k... you go back and forth back and forth like tennis and it's the same all the time) and here we are DRIVING FOR DOLLARS!!!! SPENDING GAS, MILEAGE, LUNCHES, DINNERS, OPEN HOUSES, and sometimes months with a client. So calculate a \$500k sale at 3% commission that took 6 months to find the right home. \$15k that's \$2,500 per month minus taxes, gas, tolls, lunches, house warming gifts, open house gifts.

The lazy a\$\$ realtors that just put a lock box on the door and charge 5% or 6% and got both sides of the deal and let the owners or tenants just show the house, those are the ones that got us in trouble. The ones that said SURE let's take a cash deal that is \$50k lower than the financed deal.etc.... SO now it's time to get creative and show your VALUE, show your WORTH... But stand your ground. I'm not taking a buyer or a listing that wants me to provide more than what I'm worth because it's MY BUSINESS, not NAR's, Not my brokers, not my MLS. The poor starving realtors that are money hungry may beat us at first with 1% or 2% buyer or listing fees. But in the end the conversation will go quite differently when that seller will need to go shopping and end up paying for a home more money than they needed to because their agent could not work with them and FOR their client to GUIDE, CONSULT and EDUCATE them. EVERYONE is an expert now because of the news, but they have no clue what the listing agreement or buyer agent agreement even says.

So here is some simple guidance for your listings.

Scenario

My conversation with listings just changes the way I present the commission structure. Mr. and Mrs. Seller, things have definitely changed but not as you think. Let me explain what has changed...yadayadayada. But that does not change the fact that when you bought previously, you didn't have to pay my commission or your agent's commission. Sure you may see it as unfair now to have to pay for the buyer's commission, but there are 3,000 agents in our area and that means 3000 potential buyers, which I may only have 2 or 3 prospects that would come to me directly for your listing from my advertising. And I being your agent, your listing advisor, I will exhaust all resources to be sure we can get the HIGHEST and Best offer or as close to our list price as we can.yadayadayada. Let's review my fees.

I have a scale which I let them know that sure, I will most definitely work with you on commissions. And I present something like this.

3% full buy owner listing with MLS representation – 1% to me and 2% to buyer agent – no open house, all calls and scheduling, offers and showings are handled by the owner and free usage of my electronic lock box to control access.

4% same as above but my team handles all showing scheduling, phone calls, receive and review offers, Lock box and personal showings, email blast, and 1 – 2 open houses 2% to me and 2% to buyers agent – if I become the transaction broker meaning buyer and seller through me, I only charge 3%

5% same as above includes 4 open houses, email blast, direct mail campaign, drone video and professional photos 2.5% to me and 2.5% to buyer agent, If I become transaction broker only 3% commission

6% – more for luxury or higher end – all of the above – private showings only no lock box – Full page spread in magazine with a single property website and domain.

Keep posting your ideas and concepts. I will be posting more as I go. But by all means NEVER SELL YOURSELF SHORT. Be professional, practice your buyer and seller conversations with a partner or your mortgage professional. I'm also a mortgage professional and have been having these conversations with my buyers and preparing them for months now just in case they didn't find a home in time. BUSINESS AS USUALY PEOPLE just make your calls, print out your mls sheets and call to find out the seller concession or comp or both. I'm going to try to get an attorney to create my own buyer agent agreement and listing agreement addendum.