

STATES FACE UNIQUE RISKS, SCRUTINY AS NAR SETTLEMENT TRICKLES DOWN

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Overlooked in the national scramble to address the National Association of REALTORS® (NAR) settlement, and comprehend (or decry) all the changes that are coming to the industry, is the foundational truism that applies to every facet of real estate: that it is local. Just like with every other issue, every region and even every state is facing its own hurdles with the settlement, and every community of REALTORS® will necessarily be taking a different approach as they grapple with concrete elements like the intersection of state laws with new settlement mandates, as well as more qualitative aspects like culture and geography.

One local demographic that is paying attention, and already fielding a lot of questions, are lawmakers—specifically those at the state and local level. According to Tom Larson, CEO of the Wisconsin Association of REALTORS®, representatives and regulators in his state already reached out about the changes—often with the same misunderstandings that have plagued mainstream media coverage.

“If you’re a state regulator, you’re like, ‘Look, there’s a problem here. There’s no transparency and how commissions are earned and who’s paying them.’ I’m like, ‘Wait a minute, wait a minute...here’s how it works,’” Larson laughs.

While Larson says he and his members are having productive conversations with legislators, this type of interaction illustrates how the settlement changes can percolate down and cause

specific challenges at the local level, especially with a dearth of understanding in regard to how real estate works.

Joanne Breen, past president of CT REALTORS® in Connecticut and a broker with almost 40 years of experience in the industry, said that in her state there just isn't that much concern about the changes—partly due to how agents have previously practiced real estate, and partly due to proactive cooperation with regulators over the past several months.

"So it's not been a heavy lift for us, to be quite honest compared to some of my colleagues I've spoken to in other regions," she says.

What are the specifics, though? What regional pitfalls are still lurking for agents who are not privy to their state's unique real estate landscape, and why are some regions unbothered by the settlement while others are bracing for a bumpy ride in August?

The answer is complicated, according to Larson, and no state is entirely confident in a smooth transition.

"You got 50 different states, and when you really dial into the different states...you're dealing kind of in the trenches," he says.

Democracy in action

Right at the outset, the first issue many state associations and local leaders are confronting is the misunderstandings—and cases of outright misinformation—that blossomed in the wake of the settlement.

The priority goal at that level appears to be twofold: first, convince a potentially skeptical public that the REALTORS® in their community are (and always were) in favor of transparency, and second, get the basic facts straight about the settlement.

Larson says one urgent role of his association is to help lawmakers understand the changes and status enough so that they "don't feel the need to enter into the space and address things that they're reading in the national media that aren't true, or have no application" in Wisconsin.

But there is a lot more to do. Politicians are often reacting to what they hear from constituents, and reaching out directly to the general population is a necessary part of the local effort to prepare for the changes. These are also the people who will be buying and selling homes, and their understanding of the changes—and perception of REALTORS®—matters tremendously.

Earlier this month, the California Association of REALTORS® (CAR) published an "open letter" in 40 newspapers all over the state, seeking to get their message out both in huge, nationally circulated publications like the Los Angeles Times, as well as in local papers with much smaller, hyperlocal readership.

In that letter, CAR President Melanie Baker made an emotional—and California-specific—appeal to the citizens of her state, along with seeking to provide some basic fact-checking on the settlement changes.

"Our jobs are far more involved—and far less glamorous—than what you see on real estate 'reality' shows," Baker wrote. "We come to this job because we love putting people in homes. We stay in this job because we love working with our clients, who become our friends and neighbors."

Baker added that CAR introduced a buyer agreement 25 years ago, and claimed that "while the implementation of practice changes resulting from this settlement may be new, the spirit behind them is not—at least not in California."

"We're all for transparency because we believe it's in our clients' best interests, and we know the value we bring to the transaction," she wrote.

That kind of broad-based media outreach makes sense in Baker's state—a geographically massive and fractured place, where getting the word out promises to be a massive challenge. The state has faced many unique challenges in housing, and also hosted at least three Burnett copycats (which should eventually be resolved by the settlement, though even that is not entirely clear).

In Connecticut, which is about 30 times smaller in land area with one-twelfth California's population, Breen describes outreach as much more personal—and maybe less urgent. While members have given interviews on local television news, she says the organization is going to wait until “the dust settles” before planning a big campaign to reach the public.

What Connecticut was able to do, though, was create a form and fact sheet—called a “prospective parties form”—that describes all the different types of agency, and the legal and ethical responsibilities real estate professionals have, drafted in collaboration with the state Department of Consumer Protection.

Maybe most importantly, that form is ready to be used right now, because CT REALTORS® started reaching out to regulators several months ago, around the time of the Burnett trial, to start working on educational initiatives.

“This one form is just a nice thing to have—it’s something that I email in advance, even before meeting with a new prospective client so they can look at it ahead of time,” Breen says. “It’s just a great document because it educates them on what it means when I represent you as a buyer agent—what it means if I’m a dual agent, what it means if I’m a designated agent. Does it take the place of sitting with an agent and having an agent go over all of that? No, but it’s a great starting point for the agent to have.”

That form is a powerful tool, Breen says, providing a government-reviewed disclosure that can go a long way toward getting consumers comfortable with their relationship with their agent. It also facilitates each agent approaching the conversation their own way, but with a foundation of reliable information.

Larson says something similar, noting that it is local associations rather than NAR that can best speak to their own community—both the general public and lawmakers at every level.

“NAR does their best to talk to lawmakers, but they don’t know about Wisconsin,” he says. “When we meet with (the state congressional delegation), it’s one of the first things they ask—‘Hey, what about these lawsuits?’ And we have a story to tell about Wisconsin and how we’re different and what we have in place and how it impacts us.”

When speaking to members of the community, Breen adds that her state’s REALTORS® are generally extremely comfortable discussing things like commission, buyer agency and their duties, as Connecticut has had mandatory buyer contracts for almost three decades at this point.

“This is our standard of doing business,” she says.

Stamped and sealed

One area where each state is absolutely going to need to find their own paths (to some degree) is with those soon-to-be mandatory buyer agency agreements. Even for states like Wisconsin and Connecticut, both of which already have mandatory buyer contracts, the path is not certain.

According to the most recent NAR data, only 41% of recent homebuyers said they signed a buyer agency agreement—though that was a significant increase from the year before.

Larson says that his state currently requires buyer agency agreements as soon as there are “substantive discussions or negotiations.” REALTORS® in Wisconsin are very familiar with what that means, he claims.

“For example, if you are walking through a house and (your client) starts saying, ‘Hey, boy, I really like this house. I’m thinking about writing an offer.’ That would be a flag, like—well, let’s be aware that if you want me to represent you, we have to enter into a buyer agency agreement.”

With the NAR settlement, new requirements have not been tested. While mandating a “written agreement” be signed before a buyer even shows a client a house, it is not clear if that agreement must be the kind of contract Wisconsin mandates, or the exact timing both parties must sign.

Larson says it also isn’t clear generally when or how the NAR settlement might supersede state law in his state, since the new rules would likely be more restrictive than current statutes.

"That's been the latest discussions that we've had with NAR legal counsel," he says.

According to Breen, the issues have been in the "little nuances"—making sure people put a hard number in for their compensation, for instance, as Connecticut used to allow open-ended compensation for buyer contracts.

At this early stage, letting people know that no one has all the answers seems to be an approach many are taking, for the sake of transparency. Baker, in her letter to the California public, highlighted that basic requirement, that people will need "to discuss and agree with (an) agent what the agent will do on your behalf, and...decide how much and how to pay that agent."

"Of course, it's not that simple," she continued. "How consumers work with agents in this new environment will need to work itself out, and there will be differing approaches between agents and their clients. Many in the industry, and we at (CAR) are currently working on sorting through and articulating those new practices as quickly as possible."

The letter does not mention that there is no legal requirement for buyer contracts in California. CAR's website notes that "in the past, most brokers did not use these types of agreements because either the agreements were not available or those that were available did not meet the brokers and client's mutual needs."

Larson says in times like these, he is telling members not to take any risks. Wisconsin has the luxury of buyer agency forms that are drafted and provided by a state licensing authority. As long as people continue to use those forms, and ensure any addendums are reviewed by a lawyer, they shouldn't have to worry.

"If somebody hypothetically said that the forms were not transparent in terms of how the commission is paid or how it's earned, well, it is the state that approves those forms, and then they would have to be the defendant for a defendant," he explains. "So it is the form of liability protection and risk management to have the state be the author and the entity that approves those forms."

Companies like eXp and Zillow have recently pushed out their own buyer contracts, some meant to be state-specific, intended to help ease friction with the new NAR requirements.

Larson says that if these forms meet all of Wisconsin's requirements, they are perfectly acceptable to use. But if a consumer (or a lawyer) wanted to argue that one of these brokerage-provided contracts did not line up with state law or the NAR settlement, the state wouldn't have their back.

Outside of the legal regulatory frameworks, there are many other elements that will contribute to how a particular community approaches buyer agency contracts. While eXp, Zillow and others have advocated for a simple, limited contract that can help agents get to know their client better without pressuring them to sign a lengthy form with mandatory payments, Breen says she personally doesn't see the need for that.

"I have had agreements with buyers to only show them one property or only work with them for one week until we decide if we want to work together and have a longer agreement," she says. "So our agreements have always been capable of handling many different scenarios."

Breen adds that in her decades of work in the industry, the buyer agreement simply wasn't an issue for prospective clients. While admitting that some agents are still "a little nervous" about the changes, she says that just letting people move forward with what they are comfortable with, and leaving open the possibility of signing a longer agreement once some trust and rapport is established, has worked just fine in her career.

"It was always something that was open to the agent and the client," she says.

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