

'Nothing Is Good for the Consumer Right Now': Experts Weigh Benefits, Drawbacks of Updated Real Estate Commission Policies

As new rules went into effect this month following a March settlement between home sellers and the National Association of Realtors, two legal experts have differing opinions on the real estate market's outlook as changes come to standard contracts for representation and commission payments.

The recent \$418 million joint agreement sought to resolve two antitrust cases in which the plaintiffs brought claim against the NAR over its compensation rules with the Multiple Listing Service cooperative compensation model rule. In *Moehrl v. National Association of Realtors*, the plaintiffs, home sellers who listed their homes on MLSSs, accused NAR and others of allegedly conspiring to use the mandatory buyer broker commission rule. The plaintiffs claimed these long-standing practices have inflated the cost of broker commissions, which have largely been nonnegotiable and to be paid by the home seller.

Although the agreement is still awaiting approval by the U.S. District Court for the Northern District of Illinois, new rules went into effect Aug. 17, which aim to allow buyers and sellers more freedom to negotiate commission costs.

Some of the biggest changes require homebuyers to enter into a buyer representation agreement with their potential realtor before showings happen. Another change is a shift in who foots the bill for the commission fees. Historically, the sellers have paid about 6% of the home's sale price, with 3% going to the seller's agent and 3% going to the buyer's agent. With the rule changes, the compensation amounts are no longer listed in an MLS, and it's up to the home seller and buyer to determine who pays those fees.

Robert Braun, a partner at Cohen Milstein Sellers & Toll in Washington, D.C., helped lead the plaintiffs to the settlement with the NAR. He told Law.com that he remains hopeful that the settlement will provide more transparency to a market that has been notoriously riddled with requirements and restrictions.

"We continue to be very pleased by the settlement agreement," Braun said. "We think that it's important, and includes really significant reforms to the residential real estate brokerage market that should bring relief to sellers and homebuyers."

Braun also said that he thinks the new landscape could lead to innovative ideas being generated in the real estate brokerage industry, whereas parties were previously stuck with a traditional process in which compensation was fixed on a MLS listing.

"Our hope and expectation is that the settlement agreement will lower transaction costs for sellers and buyers, and will create opportunities in the residential real estate brokerage space for new business models that didn't exist before, are more efficient than what existed in the past, and are cheaper for buyers and sellers," he said.

However, there are some concerns that the demand on buyers to negotiate commissions before offers are made may be too much, as inexperienced buyers, especially first-time homebuyers, could be unfamiliar with the details of real estate transactions.

Tanya Monestier, a professor at the University of Buffalo School of Law, told Law.com that while she thinks some of the rule changes are a "step in the right direction," she ultimately opposes the NAR settlement because it "doesn't go far enough." According to Monestier, the rule changes still allow for sellers or their agents to market "preoffers of compensation," which could still steer buyer agents toward inflated commission amounts at the expense of the homebuyer.

"The problem, in my view, with the settlement is that it still allows preoffers of compensation, meaning that when the property goes on the market, either the seller themselves or the seller's agent is allowed to market the offer of compensation as a carrot," Monestier said. "That is just going to continue to facilitate steering."

Instead, she argued that commissions become truly "decoupled," and that buyers have the ability to negotiate commissions before their agents even search for properties.

"We're going to end up with the same system as before, it's just not going to end up in the MLS," she added. "It basically just replicates the existing system."

Monestier's opinion echoes that of the Department of Justice, which argued in *Nosalek v. MLS Property Information Network* in the U.S. District Court for the District of Massachusetts in February that a proposed settlement in a lawsuit against a New England MLS "makes insignificant and largely cosmetic changes to the [MLS] Rule."

Monestier said the bigger issue lies with the current transition period, which she referred to as a "hot mess," largely due to confusing contracts that have been made newly mandatory by the agreement. Monestier fears that many buyers will fall into a similar trap as before due to being confused by the contract structure and language.

"Consumers are caught in a maze of 'What do I do?' Nobody has good answers and even the realtors themselves have no clue what's going on," Monestier said.

"Nothing is good for the consumer right now," she added.

Monestier obtained copies of several state realtor association templates for the new contracts, and wrote two reports criticizing the California Association of Realtors' draft of the contract, which she called "terrible."

According to a June report by Monestier, published on behalf of the Consumer Federation of America, the agreements are "far too disorganized and complex for the average homebuyer to understand." Major factors, such as the readability of the contracts with the lack of white space, "inconsistent formatting, extensive cross referencing, grammar and syntax errors, lack of clarity in drafting, complex wording, and general overall clutter," were also areas of concern.

The CAR, which has more than 180,000 members, redacted the contracts and came out with updated versions, which Monestier acknowledged were better but still "impenetrable" in terms of reading comprehension.

"They're so dense that nobody's going to understand them," she said. "So, they just sign it ... and I also think a lot of these forms are trying to get around the NAR settlement."

Monestier said that the contractual forms have already been replicated across the country in different states, making the effort to report on their flaws akin to a game of "whack-a-mole."

Braun cautioned that while some may be worried about confusing language in the agreements, the updated requirements are buyer-friendly and work to bring clarity to prospective homeowners.

"I do think there are people who have an interest in instilling confusion, but one of its requirements is that buyer-brokers have to disclose at the beginning of the relationship exactly what they're charging to buyers, and get buyers permission on that pricing," Braun said. "We think that's important and will result in increased transparency to buyers, and that it will empower buyers to negotiate a commission that they're being required to pay."

Braun added that, ultimately, the decision of whether to use an agent lies with the sellers or buyers, which he said is consistent with the results of the NAR settlement.

"It should be up to individual sellers and buyers and their circumstances to decide whether a real estate agent could help them, or whether they want to save money by forgoing an agent," Braun said. "Different people have different circumstances and our belief is that this settlement gives consumers better choices about who they hire, and how much they want to pay."

A NAR spokesperson did not respond for comment.