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Department of Justice Objects to Key Part of the NAR Settlement as Anti-Competitive

When the National Association of Realtors (NAR) agreed on March 15th to a \$418-million-dollar settlement with a class of home sellers in Missouri, there were two changes which NAR agreed to make.

The first was to remove from the nation's MLSs all mention of commissions being shared with buyer brokers. The second was that all buyers must sign an agreement with any broker (other than the listing agent) before showing another agent's listing.

The judge in that case has now affirmed that settlement, ignoring a five-page "statement of interest" by the Department of Justice stating that the latter provision was anti-competitive and should be struck down. Nevertheless, I want to share that objection with you.

We agents had taken a grin-and-bear-it attitude toward both rules, and I personally hadn't considered



what the DOJ is now espousing — namely, that when you ask a buyer to sign a representation agreement with one broker just to see a home, no matter how short the term of that agreement, you are limiting the ability of other brokers to compete for that buyer's business.

Prior to the NAR rule, it was considered proper practice to provide a buyer with whom we interact a "Brokerage Disclosure to Buyer" stating that they are a "customer" and not a client,

but I don't know any brokers who actually did that. If a buyer were to call one of us to see a listed home, we would want to make sure they were a qualified buyer before taking the time to show them a listing, but few of us would bother with any paperwork unless and until they wanted us to compose an offer to buy that or another listing. And we universally got away with that approach.

So it was a bit of a pain (and an annoyance to the buyer) when we were told that from now on we had to get any prospective buyer to sign a "showing agreement" or a "buyer agency agreement" before showing them a listing.

Since the NAR settlement didn't say what kind of agreement that should be, I created for our broker associates a short "Showing Agreement" which I printed up and gave to them, padded, to keep in their glove compartments. Before entering a listing, they were to fill in the blanks and have the buyer sign it before entering the listing. That copy would be given to the buyer, and I suggested that our broker associates take a picture of it on their smartphone — not to print and file it, but to keep that way as a record.

The fact remains that there is no one to audit whether this process is being followed. Remember, this is a NAR rule, not a state law, so any audits by the Real Estate Commission would not include verifying that such forms were being completed. For that reason, I wouldn't be surprised to hear of agents who simply ignore that NAR rule.

Regardless, it would have been a relief if, pursuant to that DOJ filing, the judge in the NAR settlement case had denied that provision of the settlement. And let it be said that this rule was pretty meaningless in the context of the complaint on which the NAR settlement was based, namely that listing agents shouldn't be sharing their commission with buyer's agents.

Regarding the other requirement of the NAR settlement outlawing commission sharing and the publishing of buyer broker commissions on MLSs, it has had little effect here in Colorado. The only result was that offers of compensation were rephrased on listing agreements and on contracts to buy real estate.

Now, the listing agreements still

state the same total commission — 5 to 6 percent, or whatever — but instead of saying how much of that commission the listing agent will offer to an agent for the buyer, the listing agreement now says how much the seller will offer to an agent for the buyer and then says that, if that amount is indeed paid to a buyer's agent, that percentage will be deducted from the commission paid to the listing agent. In other words, no change except in phraseology.

Why the amount the seller is offering can't be stated on the MLS makes no sense. Would it have been too much to have the judge in the settlement case deny that aspect of the agreement, too? But he didn't.

The Origin of the 2.8% Co-op

Have you ever wondered why 2.8% became the typical or standard commission offered to "cooperating brokers" who represent buyers? Here's a history lesson.

It was explained to me that, before the U.S. Department of Justice said that the Denver Board of Realtors (DBOR) was engaging in price fixing by dictating commission rates, DBOR set the listing commission at 7%, and dictated that 40% of that amount, or 2.8%, was the proper amount to share with agents representing buyers.

After price-fixing was outlawed, listing commissions declined, but the 2.8% co-op remained a fixture, so to speak, because sellers and their agents didn't want buyer agents to avoid their listings in favor of listings still offering 2.8%.

Nowadays, with buyers doing their own searching online (where that co-op commission was hidden from consumers), the reluctance to offer less than 2.8% diminished and now is far less important.

My Feb. 17, 2022, column reported that the percentage of listings offering less than 2.8% had grown from only 2% in 2015 to 30% in 2022. It's even higher now.

Just Listed: 2-BR Condo in Downtown Golden



Condos in this building at 722 Washington Avenue (called Washington Station) are in great demand because of its location in downtown Golden. This new listing is for Unit 201, which has a great corner location directly above the unit's deeded parking spot. Moreover, the stairs to the parking garage are next to the parking space and next to the door to this unit. (There's also an elevator.) This is a mixed use building, with commercial units, including the Golden Bike Shop, on the ground floor. The unit itself features an open floor plan, with slab granite countertops and cherry cabinets with handles, and an island with breakfast bar to complement the dining area. All windows and the 5.5'x11.3' balcony offer mountain views. The bathrooms and kitchen have ceramic tile floors, and the rest of the unit has carpeting in like-new condition. There's a 7'-deep storage room and laundry closet with included full-size high-efficiency washer and dryer. View a video tour, floor plan, interior pictures and a drone video at www.GoldenCondo.info.

Big Price Reduction on Brick Ranch in Wheat Ridge

There's so much to love about this home at 7085 W. 32nd Pl. For starters, it's a handyman's delight with an oversized 2-car garage that is heated and has 200 Amps of power, including two 240-Volt circuits! Also, one of the basement bedrooms has been converted into a sound studio with professional sound-proofing such that neighbors and the people upstairs wouldn't be aware of it! Altogether, including that studio with its ensuite bathroom, this home has five bedrooms and three full bathrooms. And it has a full-size bar with bar stools that is to die for next to that studio in the basement. Under the new state law, the basement could be adapted into a 2-bedroom/1-bathroom accessory dwelling unit (ADU) to provide extra income for the owner. To fully appreciate this impressive home, which has been owned and lovingly maintained by the seller for 43 years, find a narrated video tour, floor plans, and interior photos at www.WheatRidgeHome.info, then come to the open house this Saturday, 11 a.m. to 1 p.m.



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