



WASHINGTON REALTORS[®]



DB Mastermind

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INSTRUCTOR: ANNIE FITZSIMMONS



Update on Anti-Trust Litigation

- Sitzer(Missouri) Jury awarded: \$1.78 billion; trebled to \$5.8 billion
 - Court will enter judgment around April 2024; appeals will follow
- More than 20 copy cat lawsuits
 - Filed by sellers and by buyers
 - Naming national, state and local associations, MLS's, franchises and brokers
- There is an effort to consolidate all remaining actions into one
 - Motions pending (April 2024): will this happen and if so, which court?

Remember the allegation: Antitrust law is violated when sellers are required to offer compensation to buyer brokers.



Have any of your clients received this?

RESIDENTIAL REAL ESTATE BROKER
COMMISSIONS ANTITRUST SETTLEMENTS

NOTICE OF PROPOSED SETTLEMENTS

If you sold a home and
paid a commission to a
real estate agent, you
may be a part of class
action settlements

*A federal court authorized this Notice.
It is not from a lawyer.
You are not being sued.*

*Para una notificación en español, visite
www.RealEstateCommissionLitigation.com*

Questions?
Call 888-995-0207 or Visit
www.RealEstateCommissionLitigation.com

Burnett et al. v. The National Association of Realtors et al.
c/o JND Legal Administration
PO Box 91479
Seattle WA 98111



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This Notice is to inform you that proposed settlements have been reached with Anywhere Real Estate, Inc. f/k/a Realogy Holdings Corp. ("Anywhere"), RE/MAX LLC ("RE/MAX"), and Keller Williams Realty, Inc. ("Keller Williams") resolving certain claims, including in a lawsuit known as *Burnett et al. v. National Association of Realtors, et al.*, Case No. 19-CV-00332-SRB (Western District of Missouri). The lawsuit alleges the existence of an anticompetitive agreement that resulted in home sellers paying inflated commissions to real estate brokers or agents in violation of antitrust law. Defendants include The National Association of Realtors ("NAR") and the following large real estate brokerage firms: Anywhere, RE/MAX, Keller Williams, and Berkshire Hathaway HomeServices. Of these Defendants, the settlements concern only Anywhere, RE/MAX, and Keller Williams. The settlements also resolve claims against Anywhere, RE/MAX, and Keller Williams raised in at least two other lawsuits: *Moehrl et al. v. National Association of Realtors et al.*, Case No. 1:19-cv-01610-ARW (Northern District of Illinois); and *Nosalek v. MLS Property Information Network, Inc., et al.*, Case No. 1:20-cv-12244-PBS (District of Massachusetts). Although the Court has authorized notice to be given of the proposed settlements, this Notice does not express the opinion of the Court on the merits of the claims or defenses asserted by either side of the lawsuit.

Proposed settlements have been reached with Anywhere, RE/MAX, and Keller Williams. Additional settlements may be reached with other Defendants. See www.RealEstateCommissionLitigation.com for more information about these settlements and any additional settlements. You may not receive additional postcard notice of future settlements.

Am I affected?

You are a Settlement Class Member and eligible for payment if you: (1) sold a home during the Eligible Date Range; (2) listed the home that was sold on a multiple listing service ("MLS") anywhere in the United States; and (3) paid a commission to any real estate brokerage in connection with the sale of the home. The Eligible Date Range depends on what MLS you listed your home for sale on. Scan the QR code below or go to www.RealEstateCommissionLitigation.com to see the Eligible Date Range and to learn more.

What do the settlements provide?

Anywhere, RE/MAX, and Keller Williams have agreed to pay, collectively, **\$208,500,000** into settlement funds. The funds will be distributed to qualifying Settlement Class Members who submit an approved claim form, after any awarded attorneys' fees, expenses, settlement administration costs, and service awards have been deducted.

How do I get a payment?

You must submit a claim form, with information pertaining to and/or evidence of your home sale and commissions paid, by **May 9, 2025**. Claim forms can be submitted online at www.RealEstateCommissionLitigation.com or by scanning the QR code below. You can

also print a claim form at the website and mail it to *Burnett et al. v. The National Association of Realtors et al.*, c/o JND Legal Administration, PO Box 91479, Seattle, WA 98111, or email it to info@RealEstateCommissionLitigation.com.

What are my other options?

You may object to or exclude yourself (opt-out) from the settlements by **April 13, 2024**, or do nothing. If you exclude yourself, you will *not* receive a settlement payment, but this is the only option that allows you to sue Anywhere, RE/MAX, or Keller Williams relating to commission prices. If you wish to object, the Court will consider your views in deciding whether to approve or reject the proposed settlements. If the Court does not approve the settlements, no settlement payments will be sent, and the lawsuit will continue. You cannot object if you opt-out. By doing nothing, you will get no payment, and you will not be able to sue Anywhere, RE/MAX, or Keller Williams relating to commission prices. For more information, including how to object or exclude yourself and to read the full terms of the release, visit www.RealEstateCommissionLitigation.com.

What happens next?

The Court will hold a hearing on **May 9, 2024** to consider whether to grant final approval of the settlements and award fees and costs to the attorneys representing the class ("Class Counsel"). The Court has appointed the law firms of Ketchmark and McCreight P.C.; Williams Dirks Dameron LLC; Boulware Law LLC; Hagens Berman Sobal Shapiro LLP; Cohen Milstein Sellers & Toll PLLC; and Susman Godfrey LLP, as Class Counsel. Class Counsel will ask the Court to award an amount not to exceed one-third (33.3%) of the settlement funds, plus out-of-pocket expenses incurred during the case. The Court may award less. Class Counsel will also seek compensation for each current and/or former class representative involved in the actions captioned *Burnett et al. v. The National Association of Realtors et al.*, Case No. 19-CV-00332-SRB, pending in the Western District of Missouri; and *Moehrl et al. v. The National Association of Realtors*, Case No. 19-CV-01610-ARW, pending in the Northern District of Illinois. You will be represented by Class Counsel at the hearing unless you choose to enter an appearance in person or through your own counsel, at your own cost. The appearance of your own attorney is not necessary to participate in the hearing.

Questions?

This Notice is only a summary. To learn more, scan the QR code, visit www.RealEstateCommissionLitigation.com, call toll-free 888-995-0207, email info@RealEstateCommissionLitigation.com, or write *Burnett et al. v. The National Association of Realtors et al.*, c/o JND Legal Administration, PO Box 91479, Seattle, WA 98111.



Relevant date range in Washington

October 31, 2019 through February 1, 2024

This does not expose any individual broker, firm, association or MLS in Washington to liability; all claims will be paid from the settlement funds



Washington's Lawyers Know the New Law ...

- Team leader has supervisory authority over team members
- Team leader formed relationship with seller in 2023
- Off-market buyer presented offer in January 2024; Form 47 signed
- Agency Disclosure
 - Team leader represents seller; Team member represents buyer
- Prior to closing: seller's lawyer sends letter
 - Forfeit commissions
 - Listing broker is actually dual agent = misrepresentation and seller did not consent
 - Broker worked with seller for 8 days before entering services agreement
 - 2024 Agency Law pamphlet not provided (although pamphlet was delivered in 2023)



DB is, personally, the Listing Broker (or branch manager, team leader with delegated supervisory authority, etc.)

- Offer from buyer represented by broker licensed to another firm
 - DB/LB represents seller as seller's exclusive agent
- Offer from buyer represented by broker licensed to DB's firm
 - DB is a limited dual agent
 - Seller must initial the listing agreement provision, consenting to limited dual agency or DB may **not** proceed
 - Disclose in the PSA "Agency Disclosure" that seller is represented by a limited dual agent
 - Limited dual agent (DB) may take no action adverse or detrimental to buyer's or seller's interest in the transaction
 - DB cannot coach, counsel or advocate on behalf of either party
 - Buyer Broker represents buyer exclusively



Listing Broker Conversations with Seller

- Hotline questions:
 - Can a firm create a policy establishing a minimum Buyer Agent commission that must be offered by any seller for any of the firm's listings? For example, if the seller is willing to pay the listing fee but refuses to offer compensation to a Buyer Agent, can we walk away from the listing?
 - Can we state to Seller: our "Firm's Listing Policy" is "x" amount and of that, we **will** share 50% to Buyer Broker firm for compensation?



What can listing brokers say about BA comp?

- Do NOT mandate that seller offer compensation to buyer broker
- Do give seller good advice
 - CMA: broker's estimate of the value of the property
 - Presentation advice: ... clean up the yard, declutter the kitchen ...
 - Incentives: ...offer consideration of VA/FHA buyers, share buyer closing costs, offer points to reduce interest rate, offer compensation to buyer broker ...
- Help seller understand how to make property marketable
 - Every (almost) represented buyer will have 3 cash requirements
 - Down payment, closing costs, and buyer broker compensation
 - Few buyers have sufficient funds for all three ... how can you help, seller?
 - Look at comps for home value and consideration of incentives offered by other sellers
 - Show seller the Form 41 BAA so seller knows what buyers must sign



Estimated Seller Proceeds

- Since listing broker should not assume seller's offer of compensation to buyer broker, how can listing broker prepare estimated seller proceeds for listing consultation?
 - Answer: Any estimated seller proceeds prepared prior to seller signing listing agreement should not include compensation to buyer broker. Instead, LB should advise seller that the estimated proceeds will be reduced by whatever compensation seller pays buyer broker.



LB refers buyer and collects referral fee

- All brokers are required "To disclose in writing before the broker's principal signs an offer, or as soon as reasonably practical, but before the parties reach mutual agreement: ...(ii) Any terms of compensation offered by a party or a real estate firm to a real estate firm representing another party."
- LB must disclose to seller that LB will receive compensation from buyer broker firm
 - Even if buyer broker firm is the same as LB's firm
- BB must disclose to buyer that BB firm will share compensation with LB
- Disclosure must be provable
 - Email disclosure to client prior to client signing offer will suffice if provable
 - Recall requirement to retain all material correspondence in transaction folder



Form 41: "As offered by seller"

- On paragraph #5, can we write in under other: "As offered by seller"? We understand seller might offer nothing, but this is the verbiage we'd like to write in, if that is okay.
- Answer: It is not unlawful for broker and buyer to agree that broker's compensation will be what is "offered by seller" (if anything). If buyer is obligated only to pay broker whatever is "offered by seller", broker works for free if buyer purchases property with no offer of compensation from seller. Broker has no basis to ask seller to pay compensation. Broker has no basis for compelling buyer to pay something.



Amending BBSA (Form 41)

- Use Form 41A
 - Term Extended
 - Exclusive versus non-exclusive
 - Naming additional buyer's agent "Co-Buyer Broker"
 - Consenting to limited dual agency
 - Modifying amount of compensation
 - "Other"
- What about adding substitute broker, licensed assistant, transaction coordinator, etc?



Terminating Buyer Agency Agreement

If buyer signs an exclusive buyers agency agreement and I show buyer homes but then they terminate their agreement with me and sign an exclusive agency agreement with another agent, what happens when agent # 2 writes up a PSA on a property I showed during the time they had a signed agreement with me? Even though form 41 says a buyer should have “legal cause” to terminate, an agent is more often than not going to agree to terminate if a buyer does not want to work with him/her anymore. Please advise.



Disclosing Agency Agreements

- Common questions from brokers
 - Should buyer broker include Form 41 with buyer's offer if buyer is asking seller to pay compensation?
 - Should buyer broker deliver Form 41 to escrow prior to closing?
 - If transparency is the goal of the new legislation, why isn't seller required to disclose listing agreement?



What is the purpose of Form 41C?

- Buyer will see the amount of compensation offered by seller to buyer's broker, published in the MLS
- Buyer Broker will complete the blank on Form 21, para 17 using the information from the MLS printout

“Buyer Brokerage Firm Compensation: _____; Pay as offered or
\$ or % Amount Offered In Listing

Other – See Addendum”

- Boilerplate on Form 21 says:
 - If the amount written in the blank is different from the amount offered in the MLS, the amount offered in the MLS is the amount that gets paid



You Do Not Need to Include Form 41C If ...

- You mark “pay as offered” on line 17 because ...
 - Seller’s offered compensation is the same as buyer’s obligation
 - Mark “pay as offered” on F21 and skip F41C
 - Seller’s offered compensation is less than buyer’s obligation but buyer wants to pay the difference
 - Mark “pay as offered”
 - Deliver Form 40A (Buyer’s Commission Disbursement) to escrow
 - Seller’s offered compensation is more than buyer’s obligation and buyer agreed that the overage would be paid to buyer broker’s firm



You Must Include Form 41C When ...

- You mark “other-see addendum” on line 17 because ...
- SOC is less than the buyer’s obligation and buyer wants seller to make up the difference
 - Seller offers zero compensation to BB (checkbox 1)
 - Seller offers some but not enough compensation (checkbox 2)
- SOC is greater than compensation agreed with buyer and ...
 - The difference is paid to the buyer (checkbox 3), or
 - The difference is paid to the seller (checkbox 4)
- Requires signature of buyer broker



How Should Seller Counter Form 41C?

- Options (in order from Annie's most preferred to least preferred)
 - Use Form 36 to eliminate the Form 41C attached to buyer's offer and replace with Form 41C attached to seller's counteroffer
 - Use Form 36 to draft language modifying seller's obligation regarding payment of buyer broker compensation from buyer's offer
 - On the face of buyer's Form 41C, strike buyer's selection and mark/complete a new provision representing seller's counteroffer, initial all revisions (**do not use this option if seller includes a Form 36 to counter any other aspect of buyer's offer; never draft counteroffer by combining interlineations with Form 36; train on "how to draft a counter"**)



Questions?





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THANK YOU

