

## **BROKER RISK MANAGEMENT WEEKLY PRACTICE TIP**

### **NAR Litigation and the Use of Seller and Buyer Advisories**

On October 31, 2023 (Halloween), a Missouri jury awarded Plaintiffs more than \$5 billion dollars in a commission non-disclosure case filed against NAR and several brokerages. Last week, our tip provided an update regarding the case and recommendations for best practices to address it. Since that time, Broker Risk Management (“BRM”) has received numerous inquiries regarding recommendations for proceeding. BRM clients have also requested advisories to provide to clients. This tip is responding to those inquiries and requests.

From a seller’s perspective, consumers are seeing the news regarding the commission lawsuit. Sellers are now inquiring as to whether they are required to pay compensation to the buyer’s agent. On the other side, buyers are inquiring as to whether they now have to pay commissions to their agent. The outcome of the litigation is changing the way real estate agents do business.

The primary take away from the NAR litigation is that there must be more transparency between agents and their clients regarding the payment of commissions. Listing agents must clearly disclose to sellers how much they are paying in commissions and who they are paying. Likewise, buyers should be advised as to who is paying the buyers’ agent’s commission and how much. The days of agents negotiating commissions between themselves without full consumer awareness are gone.

Regarding the listing side: Sellers have three (3) options including the following:

1. Sellers can follow tradition and pay both the listing and buyer’s sides’ commissions through the MLS;
2. Sellers can pay the listing side of the commission and nothing to the buyer’s agent; or
3. A seller can pay some other amount to the buyer’s agent.

It is important that a listing agent explains to a seller their options prior to signing a Listing Agreement, and that the seller acknowledges that they have received the disclosure and understand the various options. BRM has created a Seller’s Advisory, a copy of which is attached for listing agents to use for this purpose.

When representing a buyer, it is recommended that a buyer’s agent utilize a Buyer Broker Agreement (form “Buyer Representation and Broker Compensation,” or BRBC) to evidence and solidify the relationship between the buyer and the buyer’s agent. It is also important to explain the buyer’s options and that the buyer understands that the seller may or may not be offering a commission to the buyer’s agent. BRM has prepared a Buyer’s Advisory for this purpose, a copy of which is attached.

The payment of the commission may soon be dictated by the market and the particular type of property being sold. For example, in an entry level property a buyer is generally tight on funds and paying a buyer's agent's commission may not be feasible. If a seller wishes to sell an entry level property, it may be in the seller's best interests to offer to pay the commission of the buyer's agent to sell the property. On the other hand, when a property at the high end of the market is being sold, the buyer may be in a better position to pay their agent's compensation.

## **PRACTICE TIPS**

1. All agents, whether representing buyers or sellers, must fully disclose all commissions and payments made to agents representing clients in the sale.
2. Listing agents should explain to sellers their options and the potential impacts of those decision on the sale of the property; as a seller's choices may affect the sale of the property (how the market will react to the sellers' decision as explained above). It is recommended that after explaining a sellers' options, a listing agent have a seller sign the attached which documents that they had this discussion with the seller.
3. Buyers' agents should consider using Buyer Broker Agreements with all buyers.
4. Buyers' agents should fully explain to buyers the payment of a commission in any particular transaction and document that discussion using the attached Advisory.
5. Transparency in the payment of fees is a priority and must be fully disclosed to buyers and sellers.

**WEEKLY PRACTICE TIP: DO NOT FORWARD TO CLIENTS.** *This Weekly Practice Tip is an attorney-client privileged communication for the exclusive use of clients of Broker Risk Management and their agents. It may not be reproduced or distributed without the express written consent of Broker Risk Management LLP. The advice and recommendations contained herein are not necessarily indicative of standards of care in the industry, but rather are intended to suggest good risk management practices.*