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## COMMISSION CONCERNS

# Are Buyers Agents an Endangered Real Estate Species?

Industry Players Warn of Possible Major Changes Following Lawsuit

BY JAY FITZGERALD

SPECIAL TO BANKER & TRADESMAN

**N**o one is expecting buyer agents to go the way of the Dodo bird.

But a recent court ruling on the way real estate agents are paid via commissions has some industry experts wondering whether the current compensation system can survive much longer in Massachusetts and across the nation.

In particular, some agents and brokers are eyeing how buyer agents will be compensated moving forward amid a spate of lawsuits challenging the status-quo pay structure at most real-estate firms.

“Change is coming,” said Meg Steere, an agent at Berkshire Hathaway-Commonwealth Real Estate in Watertown. “Right now, we’re kind of in a wait-and-see mode. But it seems like just a matter of time before we see major changes.”

Recent talk of a possible transformative shifts within the industry has been sparked by last month’s federal court ruling that found that the National Association of Realtors and several large brokerages had conspired to inflate the commissions paid to real estate agents.

A jury awarded plaintiffs nearly \$1.8 billion in damages – a figure that could rise to more than \$5 billion if treble damages are awarded by the judge in the case – and an eventual judge’s decision is expected to also require some form of changes to agent commission practices.



Many local Realtors don't subscribe to doomsday predictions about the future of buyer agency, but most predict the current commission structure is headed for the exit.

Specifically, the anti-trust ruling took direct aim at the industry’s so-called “cooperative compensation rule,” which calls for home sellers to pay for the commissions of buyer agents, as well as commissions for their own listing agents. Critics of the cooperative compensation system claim it has led to excessive fees designed to take care of both seller and buyer agents alike – at the expense of sellers.

NAR has vowed to appeal the verdict.

### Profound Changes Ahead?

But if the ruling stands, some believe that it could lead to profound changes within the real-estate industry.

Even before the NAR ruling came down in late October, researchers at the investment firm Keefe, Bruyette & Woods warned that a trio of lawsuits over agent commissions, including one involving Massachusetts’ main multiple listings service, could lead to an exodus of more than 1 million agents from the industry.

Local agents surveyed by Banker & Tradesman don’t necessarily subscribe to such doomsday outlooks.

But they do say it’s unlikely the current compensation system, especially for buyer agents, can survive the current legal onslaught.

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“People are certainly talking about it,” said Lee Joseph, president of the Realtors Association of Central Massachusetts and an agent at Coldwell Banker Realty in Worcester. “People are trying to learn more about the possible changes and expectations. There’s heightened awareness.”

Moving forward, Joseph said future contracts with buyers and sellers need to be much more clear on how agents are compensated – who pays whom, and for what.

Those contracts could include some form of a cooperative-compensation agreement – or just flat fees paid by home buyers to buyer-agents, Joseph said.

### Optimism for Agents

Joseph said she has no idea how future court actions will ultimately impact the industry.

“I don’t have a crystal ball,” she said.

Still, she noted that national statistics show that 87 percent of people involved in residential real estate transactions use both buyer and seller agents – and that bodes well for the demand for both types of agents moving forward.

Colleen Barry, CEO of Greater Boston and Cape Cod brokerage Gibson Sotheby’s International Realty, said it all comes down to the tricky question of how buyer agents will be compensated.

“In the future, homebuyers are the ones who will be bringing money to the table – and that money is what ultimately will be distributed,” she said. “But we need to figure out how to get the money to buyer [agents]. It will have to become part of future con-

tract negotiations – and the system will have to be more transparent.”

Barry, who oversees about 450 agents in 27 offices across eastern Massachusetts, indicated that abandoning the current cooperative compensation system isn’t as radical as some might think, noting that it only came into existence in the 1990s.

### Market Conditions a Big Factor

She also said market conditions will ultimately drive future decisions about compensation.

Right now, it’s a seller’s market – and sellers are the ones demanding changes in compensation rules. But if it ever becomes more of a buyer’s market again, buyers will have more leverage over sellers in terms of agent compensation, Joseph said.

**“The system will have to be more transparent.”**

– Colleen Barry, CEO, Gibson Sotheby’s International Realty

Steere, the BHHS Commonwealth agent, agreed that market forces will have a major impact on future compensation practices – but it may well turn out to be a negative impact.

“I think it’s going to be harder for buyer agents just starting out in the business,” she said. “It could really effect people just getting going.”

Eventually, the home-buying system could end up resembling today’s apartment-

rental market, in which tenants pay the fees for agents’ service. In the case of home purchases, buyers would pay fees for agents’ services, she said.

Anthony Panebianco, a land-use and real estate litigator at Boston law firm Davis Malm, sees major compensation changes coming within a year, not multiple years, due to the high monetary stakes involved.

He noted the \$1.8 billion verdict in the recent NAR case will spur large real-estate brokerage firms to alter their compensation rules to avoid potentially expensive legal entanglements.

More upfront contract disclosures and possible flat buyer-agent fees could be in the offing as a result, he said.

There’s also an outside chance that federal lawmakers might allow broker fees to be rolled into mortgage financing agreements, but he said that option was “very unlikely.”

Until larger firms make changes that other others can emulate, agents will simply have to wait to see what happens.

“The recent legal [actions] haven’t created a panic, but they have raised concerns,” he said. “The industry knows it has reached a tipping point.” 36-acre property off Morrissey Boulevard.

The Climate Ready Boston study estimated a potential \$1.4 billion in damages from future flooding in the downtown area alone. A 3.8-mile flood barrier across the mouth of Boston Harbor would cost nearly \$12 billion, according to a 2018 study. ◀

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