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Brokerages, Agents Face Own 'Bombshell' Decisions in Lawsuit's Wake

From Listing Contracts to Franchise Agreements, Many Changes to Consider

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SPECIAL TO BANKER & TRADESMAN



As has been widely reported, a verdict came down in the Missouri landmark case of Sitzer et al. v. National Association of Realtors, et al., commonly referred to as the Sitzer/Burnett

litigation. In the lawsuit, plaintiffs comprised of residential real estate sellers alleged that the defendant real estate companies, including Anywhere Real Estate Inc., RE/MAX, Keller Williams and Home Services of America (a Berkshire Hathaway company), conspired to force the plaintiffs to pay for the commissions of both sellers' and buyers' agents, in violation of the Sherman Anti-Trust Act.

Wisely, Anywhere and RE/MAX were able to settle quietly and avoid admissions of liability prior to the verdict. The jury deliberated for just 2.5 hours and found the remaining defendants liable to the tune of \$1.78 billion.

Could this decision see the end of the traditional commission structure? What can agents and brokerages who are worried about pay

cuts, job loss or running up against the law do to protect themselves?

First, Necessary Steps

Massachusetts brokerages may be taking comfort that the Sitzer/Burnett decision only impacts home sales in Missouri. However, a copycat federal lawsuit seeking class-action status has already been filed against some of the largest national residential firms, including Compass, Redfin, United Real Estate, Douglas Elliman and Weichert Realtors.

A candid and frank conversation between management and agents is necessary.

There are a number of different actions that franchisees or agents looking to understand their own legal requirements can take, both professionally and legally. A candid and frank conversation between management and agents at every brokerage is necessary as the evolution of commissions is impending. All parties here in Massachusetts need to contemplate their

current procedures and how they comply with existing and impending state and federal regulations. Without the ability to be innovative and anticipate industry change, some brokerages may be left behind or swimming in lawsuits.

On the listing side, management should require, and agents should anticipate, educating clients on the commission portion of their listing agreement via full and impartial disclosures as to how both the listing and buyer's agents will be compensated.

Management and agents may also look to get ahead of the proverbial legal curve with adaptive compensation structures that do not follow the traditional split-fee structure that was at issue in the Sitzer/Burnett litigation. For those looking to adapt, it is critical to understand the legal landscape and potential pitfalls down the road.

Examine Franchise Agreements

For parties seeking a more dramatic change in their professional status, like their franchise affiliation, brokerage management may want to reassess their franchise agreement in light of the Sitzer/Burnett decision.

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For example, many franchise agreements contain provisions wherein the franchisor is in default of the agreement if there is a material change in the franchisor's financial condition. A judgment against the franchisor in the magnitude of the Sitzer/Burnett decision may qualify as a default, thereby permitting the franchisee to terminate the respective agreement.

In other circumstances, where the franchisor is not a member to any present lawsuit but maintains the traditional commission policy at issue, a franchisee may have the ability to terminate the franchise agreement on the theory that remaining bound by the policy could run the franchisee and their agents afoul of the law.

Additionally, brokerages should have conversations with their insurers to see if adhering

to traditional agent commission policies would place them at risk of a denial of coverage in a potential lawsuit. Well-crafted franchise agreements have default provisions that allow a party to terminate the agreement if the actions of the other party place insurance coverage at risk. Given the cautioned position in the industry, it is also possible to renegotiate the terms of the franchise agreement.

A Time for Strategic Thinking

With the root payment structure of real estate brokerages presently being litigated, every side of the industry is looking to secure financial stability. Leveraging your position in a challenging economic environment can pay dividends for years to come.

Individual agents seeking a change typically do not have the same restrictions on employment changes as a full brokerage. In most instances, real estate agents are independent contractors and may depart their brokerage at will.

However, agents should follow the same course of action in reviewing any agreement they may have with their brokerage, anticipating the changes to the industry, and negotiating their own fees for any current listings they have.

As always, consulting with counsel to determine the legal options should be the first step for any franchisee or agent seeking to make a move. ◀

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