

# NAR Settlement Overview

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**NYSAR AE SUMMIT**

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NARdotRealtor



nar.realtor



# OVERVIEW



- Home seller Litigation
- Settlement Overview
- Class Notice
- Practice Changes
- FAQs
- Resources
- Other Litigation
- Protecting the Brand
- NAR Insurance Program

# Sitzer-Burnett

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- Sitzer-Burnett is a class-action lawsuit that was filed in Missouri federal court by a group of home sellers in the state against NAR and other defendants, including Anywhere, Berkshire Hathaway HomeServices, Keller Williams, and RE/Max.
- **NAR strongly disagrees with the October 2023 verdict and maintains that compensation has been and continues to be negotiable.**

# Settlement Overview

# Proposed Settlement Agreement

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- On March 15, 2024, NAR announced a proposed settlement agreement that would end litigation of claims brought on behalf of home sellers related to broker commissions.
- Preliminary Approval was granted on April 24<sup>th</sup>, 2024.
- The settlement is subject to final approval by the court; this hearing is scheduled for November 26<sup>th</sup>, 2024.

# Key Settlement Terms

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Release of liability

Written buyer agreements

Offers of Compensation no longer allowed on an MLS

Settlement payment

NAR continues to deny any wrongdoing

# Key Settlement Terms

## 1. Release of liability

- The agreement would resolve claims against
  - NAR, over 1.4 million NAR members, all state/territorial and local REALTOR® associations.
  - Association-owned Multiple Listing Services (MLSs)
  - Brokerage entities with an NAR member as principal that had a residential transaction volume in 2022 of \$2 billion or below.
- The agreement provides a mechanism for nearly all brokerage entities with a 2022 residential transaction volume > \$2 billion to obtain releases efficiently.

## 2. Offers of compensation prohibited from the MLS

- NAR has agreed to put in place a new rule prohibiting offers of compensation on the MLS.
- This change will go into effect on **August 17, 2024.**

# Key settlement terms (cont.)

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## 3. Written agreements for MLS participants acting for buyers

- The settlement provides that MLS participants working with buyers must enter into written buyer agreements.
- This change will go into effect on August 17, 2024.

## 4. Settlement payment

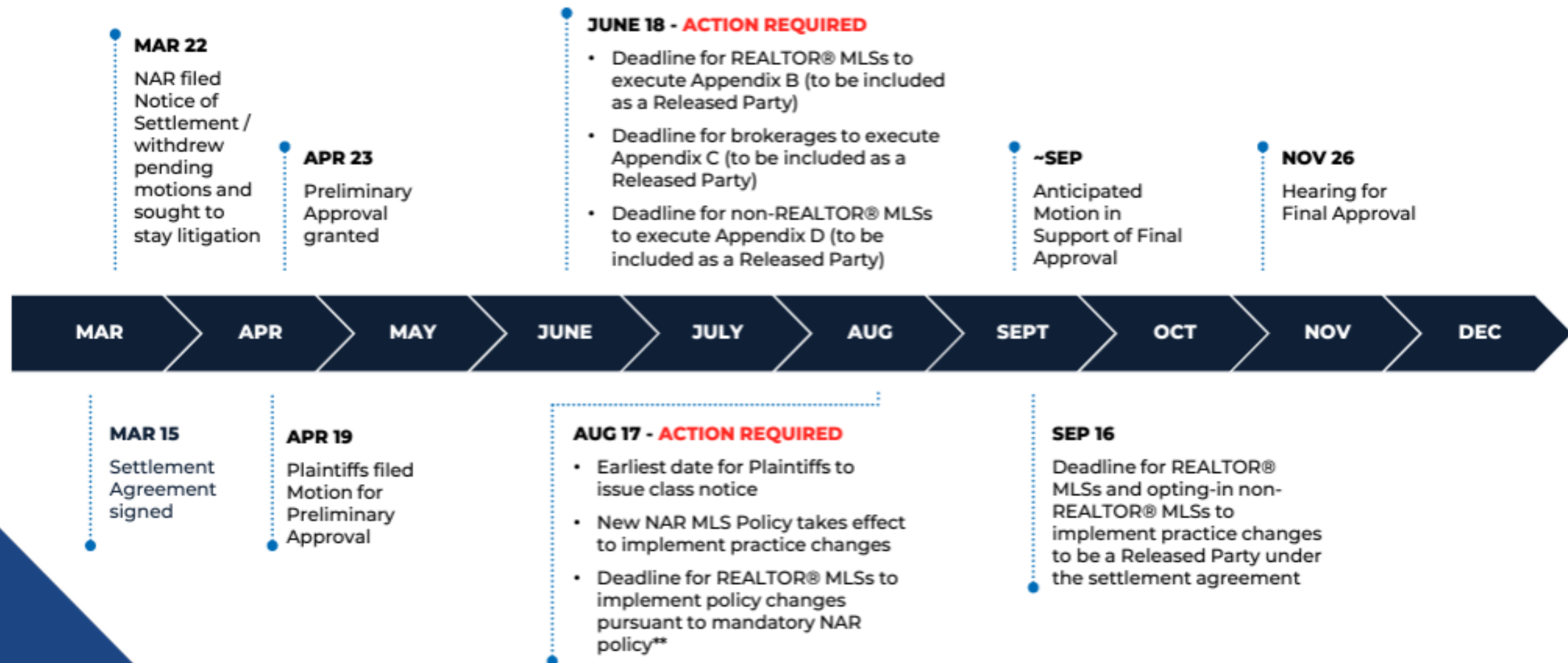
- Under the terms of the agreement, NAR would pay \$418 million over approximately four years.
- NAR's membership dues for 2024 and 2025 will not change because of this payment.

## 5. NAR continues to deny any wrongdoing

- The settlement makes clear that NAR continues to deny any wrongdoing in connection with the MLS cooperative compensation model rule that was introduced in the 1990s in response to calls from consumer protection advocates for buyer representation.



# NAR SETTLEMENT TIMELINE\*



\*As of May 7, 2024. Please refer to the settlement agreement for detailed information on deadlines.

\*\*NAR encourages all MLSs to implement the practice changes by August 17, 2024.

More information on the effective date of practice changes can be found in our FAQ at [facts.realtor](https://facts.realtor).



# CLASS NOTICE

# WHAT IS CLASS NOTICE?

## Class notice typically includes information about:

- The litigation
- The claims
- The settlement
- The class definition of  
Opt-out procedures
- Attorneys' fees and  
incentive awards to the  
class representatives (if  
any)
- The objection process
- The scheduled date for  
the final fairness hearing

# **WHEN WILL CLASS NOTICE BE SENT?**

**Class notice will be sent on or after  
August 17, 2024.**

# WHO WILL RECEIVE CLASS NOTICE?

**Class notice will be directed to members of the nationwide Settlement Class:**

*“All persons who sold a home that was listed on a multiple listing service anywhere in the United States where a commission was paid to any brokerage in connection with the sale of the home . . . .”*

LISTING DATES VARY BY STATE OR MLS

# CLASS NOTICE: WHAT TO EXPECT

- Expect direct notice to settlement class members, targeted digital efforts, and other means to reach class members
- Expect questions from consumers
- **Direct consumers to the claims administrator and case website.**



# PRACTICE CHANGES

# KEY PRACTICE CHANGE AREAS

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- ✓ Offers of Compensation
- ✓ Written Buyer Agreements
- ✓ Listing Agreements



# OFFERS OF COMPENSATION

# HOW OFFERS OF COMPENSATION ARE CHANGING



## Prohibited on MLS

As a result of the settlement, offers of compensation will be prohibited on the MLS.



## Permitted off-MLS

Offers of compensation will continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals.

**The practice changes go into effect on August 17, 2024**

# HOW OFFERS OF COMPENSATION ARE CHANGING (CONT.)

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- While the use of the MLS to communicate these offers is no longer an option, the type of compensation available for buyer brokers could continue to take multiple forms. Although not an exhaustive list, these include:
  - Fixed-fee commission paid directly by consumers.
  - Concession from the seller.
  - Portion of the listing broker's compensation.

# OFFERS OF COMPENSATION

- Listing brokers may advertise an offer of cooperative compensation in off-MLS, including:
  - On the listing, on their own website
  - Signs and sign riders
  - Flyers
  - Social media posts
  - Text, email, phone calls
- MLS/IDX may not be used, facilitate, or support any mechanism to offer compensation

## **PRACTICE NOTE**

Once agreed to, listing & buyer broker should put compensation agreement in writing

# ETHICAL PRACTICE

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- The settlement does not change the ethical duties that NAR members owe their clients.
- Code of Ethics **always** applies to REALTORS®:
  - Article 1: Protect/Promote client's interests.
  - Article 3 – ascertain compensation
  - Article 12 – be honest and truthful in communications
- Protecting the interests of clients and behaving with honesty remain cornerstones of the REALTOR® Code of Ethics.
- Mediation and arbitration of commission disputes still applies
- Procuring cause disputes may still arise and be arbitrated

**Does the prohibition on OOC in the MLS pertain to all listings?**

# WRITTEN BUYER AGREEMENTS

# Written agreements for MLS participants acting for buyers

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**The settlement provides that MLS participants working with buyers must enter into written representation agreements with those buyers before touring a home.**

- NAR has long encouraged its members to use written agreements because they help consumers understand exactly what services and value will be provided, and for how much.

**This change will go into effect on August 17, 2024.**



# WHAT IS A “BUYER AGREEMENT”?

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A buyer agreement is a legally binding contract that facilitates clarity between a broker and a buyer about what each side expects from one another.

# What triggers the requirement of a written buyer agreement?

# WHAT TRIGGERS THE REQUIREMENT?

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## Two triggers for a written agreement:

- “Working with a buyer”
- Before “Touring a home”

# KEY DEFINITIONS

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- **“Working With”:** The “working with” language is intended to distinguish MLS participants who provide brokerage services to a buyer from MLS participants who simply market their services or just talk to a buyer.
- **“Tour”:** Touring a home means when the buyer and/or the MLS participant, or other agent, at the direction of the MLS participant working with the buyer, enter(s) the house. This includes when the MLS participant or other agent, at the direction of the MLS participant, working with the buyer enters the home to provide a live, virtual tour to a buyer not physically present.
- **“Home”:** A “home” means a residential property consisting of not less than one nor more than four residential dwelling units.

# WHAT DOES THAT MEAN?

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## Working with a buyer:

MLS Participants who **provide brokerage services** to a buyer

- Identifying potential properties
- Arranging for the buyer to tour a property
- Negotiating on behalf of the buyer
- Writing and presenting offers

*As opposed to MLS Participants who simply market their services or just talk to a buyer—like at an open house or providing an unrepresented buyer access to one of their listed homes*

# WRITTEN BUYER AGREEMENT

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- Written buyer agreements must:
  - State the **specific amount or rate of compensation** the buyer broker will receive or how this amount will be determined;
  - Determine that the **compensation cannot be open-ended** but instead an amount that can be objectively ascertained. For example, language such as "buyer broker compensation shall be whatever amount the seller is offering to the buyer" is not going to fly;
  - State that **commissions are fully negotiable** and not fixed by state law; and
  - That the **buyer broker may not receive compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the buyer.**
- From now on, MLS participants in all states will have to use written agreements when working with a buyer.
- Like the other practice changes discussed today, these changes take effect **August 17.**

# WHEN DOES IT NEED TO BE SIGNED?

“Before touring a home”

*UNLESS*

State law dictates an earlier time

# WHAT TYPES OF AGREEMENTS?

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**Any type of written agreement can be used\***

- Exclusive buyer representation agreement
- Non-exclusive buyer rep agreement
- Non-agency
- Transactional
- Limited service
- Designated agency
- Dual agency
- One property, one weekend ...

*\*Must comply with state law*



# WHAT TYPES OF AGREEMENTS?

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## NAR policy does not dictate:

- What type of relationship the professional has with the potential buyer (e.g., agency, non-agency, subagency, transactional, customer).
- The term of the agreement (e.g., one day, one month, one house, one zip code).
- The services to be provided (e.g., ministerial acts, a certain number of showings, negotiations, presenting offers).
- The compensation charged (e.g., \$0, X flat fee, X percent, X hourly rate).

**What if I am the listing agent showing a property to an unrepresented buyer, do I need to have an agreement with them or provide any disclosures?**

# How will NAR enforce the requirement of buyer agreements?

# SELLER CONCESSIONS

# SELLER CONCESSIONS

- Seller concessions are allowed on MLSs
  - **Cannot be limited to or conditioned upon the retention of or payment to a cooperating broker**
  - Buyer should state in the purchase offer how they want the concessions to be used, including compensating their broker
  - Local discretion
- Buyers may ask the seller to pay their broker's fee as a term of the purchase agreement
  - Does not violate SOP 16-16

# LISTING AGREEMENTS

# **Are listing agreements affected by the proposed settlement agreement?**

# LISTING AGREEMENTS

## Required terms:

- 1 State conspicuously that broker commissions are not set by law and are fully negotiable
- 2 Conspicuously disclose to sellers and obtain seller approval for any payment or offer of payment that a listing broker will make to another broker or other representative (e.g., real estate attorney) acting for buyers, and specify the amount or rate of such payment



**What will happen to existing listings when the practice changes take effect in the MLS?**

# How does the settlement impact commercial practitioners?

# Impact on Financing

# NAR's Focus

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- NAR is **working to advocate** for first-time and low- to moderate-income buyers.
- **Interested Party Contributions:** Fannie Mae, Freddie Mac, and the FHA have limits on seller or broker contributions to the buyer for services paid by the buyer. Cooperative compensation is considered a fee that is typically paid by the seller. Fannie Mae, Freddie Mac, and the FHA exclude these fees from their calculation.
- Our interpretation of guidance from the Federal Housing Administration (FHA), Fannie Mae, and Freddie Mac is that **offers of compensation will not count toward a buyer's IPC allotment** if the market continues to operate the way it does now.

**What about VA loans and the prohibition on buyers paying commissions directly?**

# Impact on Veterans

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- A VA policy prohibited its buyers from compensating their representatives directly.
- In May, the Department put in place a temporary policy that lifted this ban.
- Housing for veterans remains a top advocacy issue for NAR.

**What are interested party contributions (IPCs)? Is compensation paid by a seller or listing broker to a buyer broker considered an IPC?**

**Can buyer broker commissions  
be included in the loan?**



# RESOURCES

# ABR DESIGNATION

Throughout 2024, NAR is making the Accredited Buyer's Representative course (or ABR course) available to members at no cost. This program is typically valued at \$295.

## Topics Covered

- Conveying your value to the buyer-client
- Conducting a seamless, productive buyer counseling session
- Guiding a buyer-client through the search-showing-selection process
- Negotiating buyer-clients' offers



**SCAN FOR ACCESS**

# FACTS.REALTOR

## Topics Covered







- FAQs
- Fact sheet
- Copy of the settlement agreement
- Who is covered by the settlement
- Toolkit with social media assets



**SCAN FOR ACCESS**

# WINDOW TO THE LAW

## “Settlement Facts” Videos

 <p><b>Who is Covered, and Who Needs to Opt In</b></p> <p>VIDEO   MAY 29, 2024</p> <p>Millions of REALTORS® are covered by the release in the proposed settlement, but some entities need to opt in to the settlement to be covered.</p>	 <p><b>Next Steps in the Settlement Process</b></p> <p>VIDEO   MAY 29, 2024</p> <p>Preliminary approval of the settlement agreement is an important milestone; find out what's next and when final approval may be granted.</p>	 <p><b>Understanding the Effective Date of Practice Changes</b></p> <p>VIDEO   MAY 29, 2024</p> <p>Practice changes take effect August 17, 2024, months before final approval of the settlement may be granted. Why? Find out in this video.</p>
 <p><b>How to Communicate Offers of Compensation</b></p> <p>VIDEO   MAY 30, 2024</p> <p>A listing broker may communicate an offer of compensation to the buyer broker off the MLS in a variety of ways.</p>	 <p><b>When You Need a Written Buyer Agreement</b></p> <p>VIDEO   MAY 30, 2024</p> <p>A new rule, effective August 17, 2024, requires MLS Participants working w/ a buyer to enter into a written agreement before touring a listed property.</p>	 <p><b>How Seller Concessions Work</b></p> <p>VIDEO   MAY 30, 2024</p> <p>Seller concessions are one way that a seller could help compensate a buyer broker.</p>



SCAN FOR ACCESS

# Other Litigation

# OTHER LITIGATION

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- Additional buyer class actions
- Department of Justice

# Department of Justice Update

# What's Next with DOJ

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- NAR's petition for rehearing en banc is pending with the D.C. Circuit Court of Appeals concerning a 2020 settlement between NAR and DOJ.
- DOJ Statement of Interest in Nosalek v. MLS PIN (D. Mass.)
- **Neither opinion affects the class action settlement agreement.**
- NAR ongoing communication with the DOJ.



# NAR LEGAL ACTION PROGRAM

# NAR'S LEGAL ACTION PROGRAM

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- Resource for litigants engaged in litigation of significance to the real estate industry
- Direct financial support to over 400+ litigants plus NAR *amicus* participation
- Latest case updates available on the Legal Action [Newsfeed](#).



## FLOORPLAN LITIGATION

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- *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*
- *Kipp Flores Architects, LLC v. AMH Creekside Development, LLC, American Homes 4 Rent, and American Housing Ventures, LLC.*

# Floorplan Copyright Litigation

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***Designworks Homes, Inc. and Charles Lawrence James v. Columbia House of Brokers Realty Inc***, 9 F.4<sup>th</sup> 803 (US Ct of Appeals, 8<sup>th</sup> Cir., 2021)

- **Allegation:** Architecture firm sued brokers alleging floorplans used in listings infringed the copyrights of its architectural works.
- **Summary Judgment Reversed:** On August 16, 2021, the appellate court reversed the trial court's grant of summary judgment, holding that a floor plan is a technical drawing and therefore does not fall under Section 120(a) of the Copyright Act's exception for pictorial representations of architectural works.
- **Status:**
  - June 2022 the US Supreme Court denied Brokers' petition for writ of certiorari. NAR filed amicus brief joined by coalition of 18 groups led by NAR.
  - Remanded to the trial court to consider the defendants' fair use defense.
  - September 2023 W.D. of Missouri found all four fair use factors supported fair use and granted summary judgment to defendant brokers. Appeal filed in 8<sup>th</sup> Circuit.

# Floorplan Copyright Litigation

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***Kipp Flores Architects, LLC v. AMH Creekside Dev., LLC*** SA-21-CV 01158, 2022 WL 4352480 (W.D. Tex. Sept 16, 2022)

- **Allegation:** Architect (Kipp Flores) brought lawsuit alleging its architectural works copyrights were infringed by Texas home developers who published floorplans when marketing properties.
- **Motion to Dismiss:** On Sept. 16, 2022, the District Court dismissed the infringement claims with prejudice. Disagreed with *Designworks* decision stating floorplans and renderings qualify for the pictorial representation exemption (120(a)).
- **Status:** Kipp has appealed the district court's decision to the Fifth Circuit Court of Appeals; NAR files an amicus brief likely March 2024.



**“It’s unreasonable to assume that Congress intended to subject real estate agents to copyright infringement liability for a floorplan posted online.”**

*Kipp Flores Architects, LLC v. AMH Creekside Dev., LLC, No. SA-21-CV-01158-XR, 2022 WL 4352480, at \*2 (W.D. Tex. Sept. 16, 2022).*

# ***Kennedy v. Weichert Co., 313 A.3d 864 (N.J. 2024)***

## **Worker Classification**

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**Class Action:** Plaintiff's 2019 suit alleged that Weichert violated New Jersey's Wage Payment Law by misclassifying him and other real estate salespersons as independent contractors and unlawfully deducting marketing fees and other expenses from their commissions.

### **Legislative and Court Timeline:**

- **2015:** NJ Supreme Court adopts ABC Test as governing standard
- **2018:** Amendment to New Jersey's Brokers Act clarifying ABC Test does not apply to real estate salespersons, notwithstanding any other law, rule or regulation to the contrary, if relationship defined via written agreement.
- **2019:** Lawsuit filed; trial court denies motion to dismiss.
- **2021:** Appellate Court holds amendment not retroactive.
- **2022:** Legislature clarifies Brokers Act retroactive applicability.
- **2023:** Appellate Court holds written agreement relevant but not dispositive factor.
- **2024:** Supreme Court holds written agreements classifying real estate salespersons as independent contractors is the dispositive factor of classification status.

# REALTOR® Value



# CONSUMER FEDERATION OF AMERICA REPORTS

# Focus:

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- **Reader Comprehension**

- Grammar
- Syntax
- Cross-references
- Headings
- Consistency
- Clutter/White Space/Font

- **Compensation**

- Modifications
- **“Problematic Provisions”**
- Termination
- Dispute Resolution

# NAR INSURANCE PROGRAM



## Coverage is available for:

- Errors & Omissions
- Directors & Officers
- Employment Practices Liability
- Cyber Liability and Response
- Crime Loss
- Patent Infringement (RPX)

# NAR INSURANCE PROGRAM



- 2023 Chubb policy is extended through December 31, 2024
- **Coverage, claim limits, deductibles all remain the same**
- 2025 coverage is being aggressively pursued
- RPX coverage will be replaced

# NAR INSURANCE PROGRAM



- Copycat lawsuits are related back to the 2019 Moehrl/Sitzer (Burnett) claim
- That claim limit is exhausted
- Coverage is available for copycat lawsuits if the association/MLS purchased antitrust excess in 2019

# OTHER INSURANCE



- Obtain loss runs from Gayle Andrews, [gayle.andrews@aon.com](mailto:gayle.andrews@aon.com)
- Consider:
  - Coverage may be restricted/excluded for known claims or conduct
  - Be upfront and complete applications thoroughly
  - Understand time limits and coverage restrictions

# PROTECTING THE REALTOR® BRAND

# Real·tor (re'al-tôr'): Member of the National Association of REALTORS®.

1

**PROPER  
FORMATTING**



2

**NO  
DESCRIPTIVE  
WORDING**



3

**PROPER  
CONTEXTUAL  
USE**





# PROPER FORMATTING

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**Preferred Format:**

**REALTOR®**

**Permitted Formats:**

**Realtor®**  
**REALTOR**

**Not permitted:**

**realtor**

# NO DESCRIPTIVE WORDING



~~Best~~ REALTOR®

~~Commercial~~ REALTOR®

~~Illinois~~ REALTOR®

~~Your~~ REALTOR®

# PROPER CONTEXTUAL USE



REALTOR® = MEMBER OF NAR

~~REALTOR® = REAL ESTATE PROFESSIONAL~~

**ENSURE THERE IS AN ASSOCIATION  
TIEBACK FOR ALL CONTEXTUAL USES OF THE  
REALTOR® MARKS.**

# HOW CAN ASSOCIATIONS PROTECT AND PROMOTE THE REALTOR® BRAND?

- ENSURE PROPER USE OF THE MARKS BY THE ASSOCIATION.
- EDUCATE MEMBERS ABOUT PROPER USE OF THE REALTOR® MARKS.
- ENFORCE AGAINST IMPROPER USES BY MEMBERS, INCLUDING HOLDING HEARINGS.

# PROPER USE BY ASSOCIATIONS

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1. ENSURE PROPER CONTEXTUAL USE IN ASSOCIATION MATERIALS.
2. DON'T USE DESCRIPTIVE LANGUAGE WITH THE MARKS.
3. USE PROPER PROGRAM NAMES.
4. ENSURE ANY TRADEMARK APPLICATION PROPERLY PROTECTS THE REALTOR® MARKS

# PROGRAM NAMES

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Associations may use the REALTOR® Marks within Program Names provided that the Association's name immediately precedes, follows or is otherwise included in the Program name.

REALTORS® Care, a program of the Lakeside REALTORS®

Lakeside REALTORS® Care

**REALTORS® Care**

# TRADEMARK APPLICATIONS

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Associations must enter into a consent agreement with NAR when filing a trademark application for content that includes the REALTOR® Marks. The applied-for mark must comply with NAR's trademark rules.

**Do not disclaim the REALTOR® Marks within the application.**

# EDUCATION



1. NEW MEMBER ORIENTATION
2. PERIODIC TRAINING SESSIONS
3. PROMOTE THE MEMBERSHIP MARKS MANUAL FOR MEMBERS



# ENFORCEMENT



1. ASSOCIATIONS HAVE A DUTY TO ADDRESS MEMBERS' MISUSES UNDER NAR'S BYLAWS.
2. USE THE SAMPLE LETTERS IN THE MEMBERSHIP MARKS MANUAL FOR ASSOCIATIONS.
3. REVIEW MEMBERS' BUSINESS NAMES, EMAIL ADDRESSES AND DOMAIN NAMES FOR MISUSES.
4. REACH OUT TO TRADEMARK@NAR.REALTOR WITH QUESTIONS.

# HEARINGS



A MEMBER'S FAILURE OR REFUSAL TO COMPLY WITH NAR'S TRADEMARK RULES CONSTITUTES A VIOLATION OF THAT MEMBER'S MEMBERSHIP DUTIES UNDER NAR'S BYLAWS AND STATE AND LOCAL BYLAWS.

# MEMBERSHIP MARKS MANUAL

For Members



The Membership Marks Manuals have comprehensive descriptions of NAR's trademark rules for members and associations.

[www.nar.realtor/mmm](http://www.nar.realtor/mmm)



# TRADEMARK RESOURCES

- Sample Letters for Member Misuses: <https://www.nar.realtor/membership-marks-manual/sample-letters>
- *Why NAR Protects the REALTOR® Trademark Video:* <https://www.nar.realtor/videos/why-nar-protects-the-realtor-trademark>
- *Make Our Marks Remarkable Video:* <https://www.nar.realtor/logos-and-trademark-rules/make-our-marks-remarkable>
- *Window to the Law Video New Membership Marks Manual for the REALTOR® Trademark:* <https://www.nar.realtor/videos/window-to-the-law/new-membership-marks-manual-for-the-realtor-trademark>
- Contact [trademark@nar.realtor](mailto:trademark@nar.realtor) with any questions!

# SECTION 4 – UNIFICATION

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- Offer annual antitrust training for members
- Leadership Code of Conduct, *et al*, and offer at least 1 hour of training for elected leadership and governing board
- Offer or promote and track new Fair Housing training requirement (2025 onwards)