



Consumer Federation of America

REQUIRED BUYER AGENCY CONTRACTS: IMPACTS ON HOME BUYERS

Stephen Brobeck

Senior Fellow

February 2024

INTRODUCTION

In 2023, only 41 percent of recent home buyers surveyed by the National Association of Realtors (NAR) said they had signed buyer agency agreements.[1] However, there is every reason to believe that this percentage is likely to increase in the future. NAR is now supporting the recommendation that all of their members representing buyers use these contracts.[2] Some proposals for settling the litigation mandate these agreements.[3] And an increasing number of states are requiring them.[4]

Class action litigation helps explain much of this increased industry interest. Two lawsuits filed in 2019 – *Moehrl v. NAR et al.* and *Sitzer v. NAR et al.* – challenged the way buyer agents are compensated. The lawsuits, and a growing number of copycat suits, argued that a NAR rule requiring listing agents (and their sellers) to offer compensation to buyer agents, allowed the industry to set commission rates, violating anti-trust laws. The industry reasoned that if buyers signed contracts affirming rate negotiation and obligating them to compensate their agents, agents and their brokers would be protected from future litigation.[5]

Before the litigation, many buyer agents felt comfortable not using written agreements, principally for two reasons. First, the agents were assured of being paid by sellers because of the mandatory compensation rule. Second, buyer agents were not required to raise issues with buyers that were difficult to explain and might discourage buyers from working with them.[6] These issues included the buyer obligation to ensure the agent was compensated, and the potential need to shift from a fiduciary relationship to dual agency, designated agency, or transactional brokerage. Even without a contract, industry rules require some compensation in the event the buyer agent showed their client a home, but then the buyer worked with another agent to purchase it. Since sellers were required to compensate buyer agents, the issue of buyer agent compensation often did not come up in discussions with buyers and, when it did, buyers were told that the listing agent or seller provided this compensation.

[1] Twenty-six percent said they did not sign an agreement; 17% said they had an oral arrangement; and 16% did not know. National Association of Realtors, 2023 Profile of Home Buyers and Sellers, p. 69.

[2] Melisa Dittmann Tracey, “How Buyer Agreements Boost Your Value, Fend Off Claims,” Real Estate News, National Association of Realtors (May 5, 2023). NAR chief legal officer Katie Johnson quoted in a Real Estate News article written by Graham Wood (November 15, 2023).

[3] See note 22.

[4] The South Carolina Realtors posted a note by Byron King on December 14, 2023 that 18 states require written buyer agency agreements. Our research found state requirements in Georgia, Idaho, Maryland, Minnesota, Missouri, Montana, North Carolina, North Dakota, Pennsylvania, Utah, Virginia, Washington, and Wisconsin, and an MLS requirement in Alaska, with question marks about requirements in Arkansas, Oklahoma, South Carolina, and Vermont.

[5] Industry interest in buyer agency contracts increased even further when, in October 2023, the Sitzer jury found industry groups guilty of collusion to set rates, and awarded plaintiffs \$1.8 billion that with treble damages, could exceed \$5 billion.

[6] Audrey Lee, “Is it time to add a buyer representation agreement to your business practice?” Real Trends (December 2, 2022).

This report will discuss several aspects of buyer agency contracts – important content, unfair provisions, format and timing, and recommended use by consumers. It will also suggest that state governments or the courts prohibit certain unfair practices. One important finding is that newer contracts usually permit buyer agents to arrange, with listing agents, additional compensation from sellers beyond what is negotiated with buyers. This provision has the potential to thwart any efforts to sufficiently separate buyer agent and listing agent commissions so that both buyers and sellers can independently negotiate the commissions of their agents.[7]

The report is based on an analysis of 43 contracts from 37 states mainly found through a Google search using state names (see Appendix A). Most of the contracts are model ones issued by state or local Realtor organizations. A few agreements are models recommended by multiple listing services (MLSs). Several are identified with specific firms. A couple of contracts were issued and recommended by state government agencies but could be modified by brokers. The contracts in the sample were issued between 1995 (Vermont Association of Realtors) and 2024 (Wisconsin Real Estate Examining Board). Fourteen of the agreements were issued in 2019 or later. The contract issued by the New York State Multiple Listing Service was not dated. Because the two major lawsuits were filed in 2019, we will focus most of our attention on model and used contracts issued from this year on.

According to one source 18 states require buyer agency agreements though we were able to confirm only 13 of these requirements.[8] The important point is that most of these state requirements only require a contract but do not specify what the agreement must contain. [9] Moreover, the industry is given great leeway in writing the contracts, which state Realtor associations typically do, then give agencies and brokers the ability to modify them. Accordingly, while the contracts must conform to state laws such as those on agency and confidentiality, these agreements are written to benefit agencies and brokers.

[7] Article 7 of the NAR's Code of Ethics and Standards of Practice prohibits a Realtor from accepting compensation from more than one party without consumer disclosure and informed consent. However, buried in lengthy, complicated contracts that most consumers will not read or understand, multiple compensation clauses will unknowingly be agreed to.

[8] See note 4.

[9] There are some exceptions. For example, a relatively old (1995) North Dakota State law (70-02-03-05.1) requires that buyer broker agreements include an expiration date, amount of the commission or other broker compensation, services to be provided to earn this compensation, and a separate dual agency disclosure if the agent represents both buyer and seller. These are essentially the requirements of a much newer (2023) Washington State statute though this law does not require a separate dual agency consent; it is in the contract. Stokes Lawrence, Revisions to Washington Agency Law Effective January 1, 2024 (December 18, 2023).

Most Important Contract Provisions

There are dozens of provisions in most buyer agent agreements but some are far more important than others. Here are those about which we think consumers should be most aware and possibly concerned.[10]

Buyer Agency: The buyer contracts not with the individual agent but with the agent's broker or agency (who is often referred to as "agent"). Brokers then have the authority to assign a different agent to work with the buyer if the buyer or the agent is dissatisfied or the agent is unable to carry out their responsibilities.

Type of Agreement: A large majority of contracts are "exclusive." Once signed, buyers cannot work with another agent during the length of the contract. Contracts can be "non-exclusive," but they are not common and are not favored by agents.

Length of Contract: Contract lengths usually range between one month and a year. Agents often recommend contracts of 90 or 120 days. Buyer obligations extend beyond the contract period for a specified period of time, often six months, if a home shown earlier by the agent is purchased by the buyer.

Termination of Contract: Most contracts do not provide for early termination unless both buyer and agent agree. Yet, when the agreements do allow this termination and it is initiated by buyers, they are sometimes obligated to pay a fee.[11]

Buyer Compensation, Commissions: Buyers are obligated to provide full compensation, usually commissions representing a percentage of the sale price. Almost all contracts allow sellers to pay all or a portion of these commissions. In at least two contracts, buyers must be notified of this seller "concession" before an offer is made.[12] Many contracts also allow buyer agents to receive any compensation offered by sellers above the contracted amount agreed to by buyer and buyer agent.

[10] The most informative discussion we have seen about these provisions is contained in a buyer brochure – titled What You Should Know About the Buyer Brokerage Agreement – prepared by Wendy Gilch, a Pittsburgh-area consumer advocate who is seeking to increase information available about individual brokers and also inform consumers. Another informative source is the article – What's a Buyer Broker Agreement and What Should You Know Before Signing One? – prepared by Summer Rylander and Amber Taufen and printed by homelight.com.

[11] The buyer agency agreement for Maryland (2016), for example, states there will be a buyer fee for cancellation but does not specify the amount.

[12] The buyer agency agreement of the Northwest Multiple Listing Service (2021) requires buyer notice before preparation of an offer. The agreement of Summit/Sotheby's (2017) requires notice before presentation of an offer when the property is not listed with a brokerage.

Buyer Agency Compensation, Fees: There is often a place for “retainer” fees that are non-refundable and sometimes credited as part of the commission but at present, not often charged. There is also often a place for other fees. In some areas, for example, there is a charge, usually ranging between \$200 and \$900, that is often called an administrative, transaction, or regulatory compliance fee.[13]

Buyer Agent Compensation, Rebates: All but nine states permit buyer brokers to rebate a portion of their commissions back to buyers. While a small number of brokers advertise this benefit, a large majority do not offer rebates and, if asked, will not provide one.[14] This option was not found in any of the contracts in our sample.[15]

Conflict of Interest with Representation of Sellers: Most buyer agreements provide for fiduciary representation in which buyer agents are obligated to be totally loyal to buyers.[16] But most contracts also provide for a switch, dependent on state law, to dual agency or transaction brokerage, when the agent or broker represents or wants to work with the seller. Dual agents and transaction agents are essentially facilitators who cannot favor either party. Facilitators, for example, cannot give the buyer any advice that might harm the interests of the seller, including recommending the submission of an offer with a lower price. If the agent or broker is already representing the seller, they may give buyers the option of accepting a designated agent from within the agency. Some contracts provide a space for buyers to approve or reject the future use of dual agents, transaction brokers, or designated agents.[17]

Conflict of Interest with Representation of Other Buyers: Contracts provide buyer agents with the ability to work with other buyers who are interested in the same properties, including showing different clients the same property and preparing offers for all of these clients.

Dispute Resolution: Most contracts encourage or require that disputes be resolved first by mediation and/or arbitration, and some agreements limit the buyer’s ability to litigate

[13] Tom Higgins, Beware ‘Junk Fees’ When Buying a Home (Kiplinger Personal Finance, September 22, 2023). Jeff Riber, Real Estate Brokerage Transaction Fees (Pursuit Real Estate, September 28, 2021).

[14] State Support for Anti-Rebate Prohibitions Weakens, Consumer Federation of America press release (December 15, 2021).

[15] Rebates are most often offered by discount brokers. For example, Minnesota Realtor (and attorney) Doug Miller charges a drafting fee of \$125, a showing fee of approximately \$44, a firm trip fee of \$125, and a commission of 1.35 percent with a \$3,000 minimum then rebates the difference between these expenses and buyer compensation provided by the seller back to the buyer.

[16] In Florida, most agents and brokers work as transaction brokers so do not face this problem. Stephen Brobeck, Does Transaction Brokerage in Florida Serve the Interest of Home Sellers and Buyers? (Consumer Federation of America, January 2022).

[17] For example, the buyer representation agreement of the Idaho Realtors (2020) gives buyers the option of approving either limited dual agency (and/or assigned agency) or single agency. This choice is also provided by Realtor contracts in Maine, Minnesota, North Carolina, Pennsylvania, South Carolina, South Dakota, and Washington.

issues. These limitations include requirements that buyers initially seek to resolve complaints through mediation or arbitration, sometimes both, waive the right to a trial by judge or jury, and limit the agent's dollar liability.[18]

Agent Disclaimer: An additional limitation on buyer agent liability is disclaimers in most contracts that buyer agents lack expertise in many areas related to the sale. These areas include the law, Federal or State tax codes, financing, surveying, engineering, architecture, the environment, and other physical conditions or nonphysical details of the property. Some contracts urge the buyer to seek advice about the agreement from an attorney.

Unfair Contract Provisions

There are provisions in some or many contracts that may lead to unfair buyer broker treatment of buyers. They relate to commissions, other fees, conflicts of interest with buyers and other sellers, and dispute resolution.

Supplemental Buyer Agent Compensation: There is a provision in almost all recent buyer agent agreements that, if the seller offers a larger buyer agent commission than the buyer and buyer agent agreed on, the agent can retain the difference. For example, if a buyer negotiates a commission rate of two percent with their buyer agent and the seller agrees to provide three percent, the buyer agent can pocket the one percent difference instead of allowing the buyer to use this one percent to help cover sale costs.

This provision has the potential to inflate seller or buyer costs. The seller either has to pay the one percent themselves or add it to the sale price, increasing buyer costs. More importantly, the provision has the potential to allow the industry to preserve a fixed rate system even if mandatory offers are prohibited. For instance, listing agents can prepare sellers for this expense by informing them that they might have to provide a three percent commission to cover buyer agent costs. If the buyer negotiates a two percent commission, the buyer agent can inform the listing agent that they need three percent, and most listing agents would probably agree to this three percent and recommend it to their client. They would do so because they are eager for the sale to be finalized and also because almost all listing agents also have buyer clients, so would benefit from this practice when working with buyers. One can also imagine buyer agents steering clients to those properties whose listing agents are willing to provide the additional compensation.

[18] For example, the buyer representation agreement of the Oregon Realtors (2022) requires any disputes beyond the jurisdiction of small claims court to be "resolved through mediation, and if unresolved through mediation, to binding arbitration...". It also states that, by signing the agreement, buyers waive the right to a trial by judge or jury.

The right of buyer agents to collect this additional compensation is framed in different ways: Some contracts state that buyer agents can retain the additional compensation offered.[19] Other agreements say that buyers are not entitled to this additional compensation.[20] Still other contracts permit buyer agents to receive compensation from more than one source (i.e., most often from both the buyer and seller).[21] In home sales, buyer agents should not be permitted to collect compensation from their buyer then seek additional compensation from the seller. In a coupled commission system, sellers rarely offer higher compensation than the buyer has agreed to pay. But if rates were uncoupled and buyers negotiated commission rates down, a difference in rates would become much more frequent. There have been several proposals from various sources for uncoupling commissions that prohibit this additional buyer agent compensation.[22]

Unreasonable fees: As noted earlier, some brokers are now charging “administrative” or “transaction” fees, usually ranging between \$200 and \$900, that are usually not credited to the payment of commissions. These “junk fees” are not justifiable given relatively high commission rates which today usually provide ample compensation to both agent and broker. In the current marketplace, it is unfair for agents and brokers to charge them.

Most contracts also include space for a “retainer” fee. Brokers have told us that this fee is not currently charged. However, if rates are uncoupled and decline, we expect that retainer fees will increasingly be added, and there is some justification for this fee. In today’s market, buyer agents not infrequently show properties to a potential buyer, sometimes dozens over a lengthy period of time, yet receive no compensation when a sale is not made. If buyer agents charged an upfront retainer, these agents would receive some compensation for their efforts when there is no sale, and non-serious consumers would be less likely to waste the time of agents. The size of the retainer fees could be related to the number of properties shown. However, these fees should be reasonable and, in the event of a sale, be credited to the commission paid.

Requiring Buyer Acceptance of Dual Agency, Designated Agency, or Transaction

Brokerage: In today’s marketplace, where nearly all individual agents and brokers work with both sellers and buyers, conflicts of interest inevitably arise. One major conflict is when a

[19] For example, the buyer agency agreement of the North Carolina Association of Realtors issued in July 2022. This additional buyer agent compensation, though, must be disclosed orally to the buyer before or at the showing and disclosed in writing before an offer is made.

[20] For example, the buyer representation agreement of the Louisiana Realtors issued in November 2023.

[21] For example, the buyer representation agreement of the Oregon Realtors issued in 2022.

[22] A proposal of a rule that may be agreeable to both industry experts and plaintiff attorneys to resolve the commission lawsuits was developed by a group of MLS lawyers and presented publicly at a January 2024 industry forum reported on by Andrea Brambila in Inman on January 26, 2024. A consumer proposal -- Real Estate Brokerage Class Action Lawsuits: How to Effectively Separate (“Decouple”) Listing and Buyer Broker Commissions – was developed by the Consumer Federation of America and released in September 2023.

buyer agent agrees on a fiduciary relationship with a buyer, who then is interested in a property listed by that agent or their broker. But since the interests of buyers and sellers usually differ, the agent and broker cannot provide fiduciary representation to both buyer and seller. State laws permit the shift in agent's role from fiduciary to facilitator but require this shift to be approved, usually in writing, by both buyer and seller. Some contracts, though, include this approval without giving buyers a choice.[23] We believe that the possibility of a shift in an agent's role should be included in the contract and discussed with the buyer, but the buyer should not be asked for their approval until a conflict emerges in relation to a specific listing.

Not Explaining How Conflicts of Interest Involving Other Buyer Clients Are Resolved:

Nearly all contracts allow buyer agents to market, show, and submit offers on property for all of their buyer clients. Yet, rarely do the contracts explain how the agents treat fairly their buyers interested in the same property. For example, do brokers give preference to buyers willing to submit the largest offer or those prepared to pay cash? Or, do they play buyer clients off against each other – e.g., “I have another client interested in that property” – to encourage the submission of an offer. One solution is provided by the contract of a long-time exclusive buyer broker which states that the broker will not represent more than one buyer client at a time on the same property. Priority is given to “the first buyer client who expresses an interest in submitting an offer on such property.”[24]

Limiting Remedies for Buyers with Complaints: Many contracts try to discourage or prohibit litigation to resolve any disputes that might arise. Several agreements require aggrieved buyers to first submit complaints to mediation and, if that is unsuccessful, to binding arbitration. CFA believes it is desirable to try to negotiate settlement of minor matters, including those involving miscommunication resulting in modest consumer harm. But CFA also believes that the ability of consumers to litigate any matter should not be limited.[25]

Several contracts also limit the amount of buyer agent liability to the amount of the compensation the agent received[26] while another agreement effectively caps this liability

[23] Some contracts that do give buyers a choice are listed in note 12.

[24] Exclusive Buyer Representation Agreement developed and used by Tom Wemett, a retired exclusive buyer broker who operated brokerages in Massachusetts and Florida.

[25] As noted earlier, the buyer representation agreement of the Oregon Realtors requires first mediation, and if that does not resolve the issue, arbitration while waiving the buyer's right to a trial by judge and jury (apart from small claims court). The agreement of the Georgia Realtors (2020) states that “the decision of the arbitrator shall be final and the arbitrator shall have authority to award attorneys' fees and allocated the costs of arbitration.”

[26] For example, the buyer broker agreement of the South Carolina Realtors (2017) states that the broker “shall not be liable to Buyer, in an amount exceeding that Broker's Compensation by reason of any act or omission, including negligence, misrepresentations, errors and omissions, or breach of undertaking, except for intentional or willful acts.”

at \$5,000.[27] These limitations may well fail to penalize agents sufficiently for any egregious conduct.

Prefilled Terms: Several contracts, especially those used by individual agencies, pre-filled several blanks on terms such as commission rate and length of contract. One intention of this pre-filling is to discourage negotiation of these terms. Yet, if the contracts are received in advance of a meeting, the prefilled terms provide important information to the buyer about what the agent wants to charge.

Contract Format and Timing

If buyers cannot understand the contract, or have no time to review it before signing, any value of the agreement to buyers is greatly diminished. While contracts of necessity must contain legal concepts, the agreements should as much as possible be written “in plain English,” use readable type size and clear organization, and not contain non-essential provisions, especially numerous clauses intended to free agents of all liability. Contracts we reviewed varied considerably in this respect. For example, the agreement used by now-retired exclusive broker Tom Wemett was three pages (not including buyer and agent signature lines) and in 10-point type while also using language that could be understood by literate buyers (see Appendix B).[28] In contrast, the 2020 buyer brokerage agreement of the Georgia Association of Realtors (GAR):

- is six pages (not including signature lines) of small type,
- contains only four broker duties to buyers, but eight buyer duties to agents, as well as a lengthy section on the “limits on broker’s authority and responsibility,”
- includes sections, such as those on GAR Forms and a potentially useful cyberfraud warning, buried near the contract’s end, that likely would not be read but also could limit the liability of agents, and
- is written by lawyers for lawyers, for example, the first sentence on “protected period” which reads: *“In the event that during the Protected Period, as that term is defined below, following termination or expiration of this Brokerage Agreement, Buyer purchases, options or contracts to purchase or exchange, or contracts to purchase ownership interest in a legal entity which owns, leases or lease purchases any property which during the term of this Agreement was submitted to, identified or shown to buyer by Broker or from which Broker provided information about to Buyer, then notwithstanding any provision to the contrary contained herein, Buyer shall pay Broker at closing or the commencement of any lease, if applicable, the commission or commissions set forth above.”*

[28] This contract was developed and used by exclusive buyer broker Tom Wemett mentioned in note 24.

[27] The right to represent buyer’s agreement of the Vermont Association of Realtors limits broker liability to one-half of their compensation or \$5,000, whichever is greater.

The timing of the disclosures is equally important. Buyer contracts are often given to buyers, for the first time, just before an offer is made. At this point buyers have virtually no opportunity to read, understand, deliberate on, and negotiate the terms of the agreement. Early on in the relationship between buyer and buyer agent, the agent should provide the broker's standard buyer contract to the buyer, which then allows the buyer to consider, seek legal advice about, and negotiate terms such as agent compensation and the length of the contract before any offer to a seller. One option for resolving the mandatory offer issue includes a requirement that before arranging the first showing, buyer agents provide to buyers a single-page, easy-to-read disclosure form disclosing what and how they will be paid.[29]

Recommendations to Home Purchasers

Before signing any buyer agent agreement it is important for buyers to carefully select their agent. The recent sales experience of the agent and detailed comments from former clients, as well as recommendations from trusted friends and associates, can be helpful in making this decision. Zillow agent profiles usually include number of sales in the past year, with information on each, as well as comments from former clients. Realtor.com agent profiles frequently list recent sales. Since information from either source is often limited, it is important to consult both. However, it is also advisable to interview agents. Before the interview, one should request a copy of the buyer agent contract, paying special attention to issues (below) which one can discuss and negotiate with the agent.

A buyer should be prepared to walk away from an unfair contract or inflexible agent. As buyer contracts are used with greater frequency, buyers are likely to demand more from these contracts, and an increasing number of agents and their brokers are likely to grow more flexible about agreeing to customer requests. Should a buyer ever work with a buyer agent without a contract? It might be wiser to work directly with a listing agent who is a dual agent or transaction broker but also hire an attorney to protect one's interests.

Length of Contract: While the agent may well push for a contract of at least 90 days, we recommend asking for a term of no more than 60 days, which most pro-consumer agents will accept.

Termination of Contract: We recommend that the contract contain no penalty for early

[29] This mandatory rule was developed by a group of MLS attorneys and is part of the proposed settlement rule changes reported on by Sylvia Brambila in Inman on January 26, 2024.

termination. Most contracts allow agents to unilaterally withdraw from the agreement, and buyers should have the same opportunity. Keep in mind, though, that if another agent assists in the purchase of a property that the previous agent had shown, the buyer has a legal obligation to compensate the first agent.

Agent Commission: Buyers should try to negotiate the buyer agent commission down from the area's standard 2.5 or 3.0 percent rate. Increasingly in some areas, buyer agents are willing to represent buyers for only a 2.0 percent rate. If the buyer has qualified for a mortgage, can pay cash, has found a property, or the property is expensive, the buyer has a greater ability to negotiate down the rate.

Buyer agents will ask listing agents whether sellers are prepared to make "concessions" to help buyers afford the buyer agent commission and other expenses including improvements to the property. Buyers should ask whether the buyer agent will be seeking compensation from the listing agent (and seller) above the commission agreed to by buyer and their agent. This additional compensation might tempt the buyer agent to steer the buyer to listings with that compensation. Buyers should also make certain they know what seller concessions are available from a seller before submitting an offer on the property.

Agent Fees: Buyers should be willing to consider paying a retainer fee. This fee provides the buyer agent some compensation if they show many properties that the buyer decides not to purchase. Buyers should make sure the fee is reasonable and request that it be credited to the commission if the sale occurs.

Transaction and administrative fees should be questioned. The commissions should cover these services. And if the fees are agreed to, they should be credited to any commission paid.

Acceptance of Shift from Fiduciary Representation to Dual Agency or Transaction

Brokerage: We recommend not agreeing to any shift in loss of fiduciary representation (total loyalty) when signing the buyer agency agreement. This agreement could encourage the agent or broker to promote properties that they have listed in order to retain the entire commission. Buyers should only agree to loss of true representation if they have evaluated a number of properties and concluded that the one listed by the buyer agent or their broker is the one they want. Keep in mind that dual agents and transaction brokers cannot legally give a buyer any advice that disadvantages sellers, including a recommendation to request a lower sale price or larger seller concessions.

Conflicts of Interest Involving Other Buyer Clients of the Agent or Broker: Buyers should

ask their agents how they will fairly treat different clients who are interested in the same property.

Dispute Resolution: Buyers should try to settle minor issues in discussions with the agent and if necessary, also with the broker. Buyers should not give up the right to litigate important issues and should object to any required dispute resolution process, such as arbitration, that is lengthy, costly, and/or seems unfair.[30]

Summary and Conclusions

For decades many home buyers worked with real estate agents on an informal basis without having signed buyer agency agreements. However, largely because of recent class action litigation, industry leaders are now urging Realtors to use these contracts, mainly as protection against future lawsuits though some also recognize the benefits to agents of working with informed and committed buyers.

These contracts have the potential to benefit home buyers yet many Realtor created forms do not. Required in some states, nearly all agreements have been written by the industry, usually by attorneys working for state Realtor associations. Not surprisingly, most contracts are long, legalistic, and written to benefit brokers. Moreover, they are usually not given to buyers early in their relationship with agents so that buyers have little ability to read, understand, and negotiate these complex agreements upfront.

Some contracts contain provisions that are unfair to buyers. These include:

- charging fees on top of 2.5-3.0 percent commissions that are not credited to the commissions,
- requiring buyer loss of fiduciary representation when agents or agencies have listed properties of interest,
- not explaining how potential conflicts of interest involving all buyers of an agent or agency are resolved, and
- severely restricting buyer remedies including prohibiting litigation and limiting agent liability to the amount of their commissions.

Yet, the most anti-consumer provision, part of almost all recently written contracts, would undermine efforts to allow price competition in commission rate-setting. Many contracts now are being written to allow buyer agents to be compensated by their own clients and also by sellers. This provision would allow buyer agents to work with listing agents to

[30] The plaintiffs who won a substantial award from a jury in *Sitzer v. National Association of Realtors et al.* last October may not receive this award if the U.S. Supreme Court, in a February 2024 appeal from an industry defendant, decides that buyer contracts they signed prohibit them from litigating disputes. See Andrea V. Brambila, "HomeServices wants US Supreme Court to weigh *Sitzer/Burnett* case," *Inman* (February 5, 2024).

maintain high, fixed commission rates, as they have for decades. Buyer agents could continue to steer clients to properties and their listing agents that offer these rates. Listing agents, most of whom also represent buyers as well as sellers, could continue to persuade their clients that today's 2.5 or 3.0 percent commissions were normal and would incent buyer agents to sell their properties. Consequently, despite efforts by buyers to negotiate buyer agent commissions, agent commissions would still effectively be set by the industry. [31]

In any settlement of the many class action lawsuits, it is important that the courts prohibit buyer agents from collecting compensation from both their clients and from sellers. State attorneys general should also take a close look at the industry-written contracts that home buyers increasingly are being asked to sign.

The growing use of buyer agency agreements increases the importance of buyers carefully selecting an agent. This selection should include:

- Doing internet searches of candidates, paying particular attention to Zillow and Realtor.com agent profile information about recent sales and customer evaluations.
- Asking agents being considered to provide a copy of their buyer agency contract, including information about agent compensation, exclusivity, contract length, and potential conflicts of interest.
- Being willing to negotiate contract terms and, if the negotiation is unsuccessful, considering other agents.
- If working directly with listing agents, insisting that the agent act as a facilitator (i.e., either a dual agent or transaction broker) so that this agent cannot lawfully favor the seller. Also, consider hiring an attorney to review and possibly negotiate the terms of the agreement with the listing agent.

The class action litigation has set in motion events that could be highly beneficial to home buyers. However, these benefits would likely be severely curtailed if buyer contracts do not receive close scrutiny and are improved.

[31] Article 7 of NAR's Code of Ethics and Standards of Practice recognizes the unethical nature of buyer agent compensation from both buyer and seller but gives Realtors the option of seeking buyer consent for this practice. In almost all instances, it would be easy for buyer agents to secure this consent since it is built into long, legal contracts that few buyers would carefully read and, if they did and objected, could be told that the buyer agent needed the compensation and would collect it from the seller. Few buyers would realize the practical and legal implications of this approval.

APPENDIX A: BUYER AGENCY AGREEMENTS

| <u>State</u> | <u>Date</u> | <u>Sponsor</u> |
|--------------|-------------|---|
| AL | 2005 | EBAA (Realtor) |
| AK | 2015 | Alaska MLS |
| AZ | 2010 | Arizona Realtors |
| CA | 2017 | California Assn of Realtors |
| CT | 2015 | Eastern CT Assn of Realtors |
| DE | 2018 | Delaware Assn of Realtors |
| DC/MD | 2016 | Greater Capital Assn of Realtors |
| FL | 2016 | Florida Realtors |
| GA | 2020 | Georgia Assn of Realtors |
| HI | 2017 | Hawaii Assn of Realtors |
| ID | 2020 | Idaho Assn of Realtors |
| KS | 2017 | Government approved agreement |
| | 2014 | Kansas Assn of Realtors |
| | 2008 | Kansas City Assn of Realtors |
| | 2013 | Better Homes & Gardens/Kansas CityHomes |
| LA | 2023 | Greater Baton Rouge Assn of Realtors |
| ME | 2018 | Maine Assn of Realtors |
| MA | 2008 | Massachusetts Assn of Realtors |
| MI | 2010 | Move2Michigan.com |
| MN | 2013 | Minnesota Assn of Realtors |
| MT | 2010 | Montana Assn of Realtors |
| NV | 2017 | Nevada Assn of Realtors |
| NH | 2007 | New Hampshire Assoc of Realtors |
| | 2005 | Keller Williams |

| | | |
|----|------|---|
| NJ | 2019 | New Jersey Realtors |
| NM | 2023 | New Mexico Assn of Realtors |
| NY | NA | New York State MLS |
| NC | 2017 | North Carolina Assn of Realtors BAC |
| | 2022 | North Carolina Assn of Realtors Guidelines for Completing BAC |
| OH | 2019 | Columbus Realtors |
| OK | 2014 | Oklahoma Real Estate Commission |
| OR | 2022 | Oregon Realtors |
| PA | 2020 | Pennsylvania Association of Realtors |
| | 2020 | West Penn Multi-List |
| SC | 2017 | South Carolina Association of Realtors |
| SD | 2021 | South Dakota Department of Labor |
| TN | 2015 | Tennessee Realtors |
| TX | 2022 | Texas Realtors |
| UT | 2017 | Sotheby's/Summit |
| VT | 1995 | Vermont Assn of Realtors |
| VA | 2019 | Virginia Realtors |
| | 2019 | Northern Virginia Assn of Realtors |
| WA | 2021 | Northwest MLS |
| | 2024 | Two descriptions of legal changes effective 1-1-2024 |
| WI | 2024 | Wisconsin Real Estate Examining Board (mandated) |

APPENDIX B:

Exclusive Buyer Representation Agreement

1. PARTIES: _____

("Buyer") grants

_____ *Homebuyer Advisors LLC* _____ ("Broker") the exclusive right to work with and assist Buyer in locating and negotiating the acquisition of suitable real property as described below during the term of this working relationship.

2. TERM: This Agreement will begin on the _____ day of _____, _____ and automatically renew on a month to month basis thereafter until terminated by either party by written notice to the other at any time without further obligation.

3. PROPERTY: Buyer is interested in acquiring real property as follows below or that is otherwise acceptable to Buyer ("Property"):

Type of Property:

Location:

Price Range: \$ _____ to \$ _____

Additional Information:

4. BROKER'S OBLIGATIONS:

(a) Broker Assistance. Broker will:

1. Use Broker's professional knowledge and skills;
2. Assist Buyer in determining Buyer's financial capability and financing options;
3. Discuss property requirements and assist Buyer in locating and viewing suitable properties;
4. Assist Buyer to contract for property, monitor deadlines and close any resulting transaction;
5. Cooperate with real estate licensees working with the seller, if any, to affect a transaction. Buyer understands that even if a seller or a real estate licensee who is working with a seller compensates Broker, such compensation does not compromise Broker's duties to Buyer.

(b) **Other Buyers.** Broker could show or present the same property to other buyer clients. However, it would be a conflict of interest for Broker to represent more than one buyer client at a time on the same property. Broker would not be able to represent Buyer if another buyer client has already expressed an interest in submitting an offer on property Buyer may be interested in. Broker would be involved in setting negotiation strategy, pricing and terms for two buyer clients, pitting one against the other. Clearly this is a conflict of interest for the Broker and a violation of the duty of Undivided Loyalty to both buyer clients. Therefore, Broker will negotiate a deal to a conclusion on behalf of the first buyer client who expresses an interest in submitting an offer on such property. If Buyer is the second buyer client and wishes to pursue a purchase of such property, Broker agrees, upon written request from Buyer, to release Buyer from any further obligation under the terms of this Agreement with regard to a purchase of said specific property only, so that Buyer may pursue a purchase by other means if desired.

Buyer (_____) (_____) and Broker (_____) acknowledge receipt of a copy of this page 1 of 3 pages.

- 2 -

(b) **Fair Housing.** Broker adheres to the principles expressed in the Fair Housing Act and will not participate in any act that unlawfully discriminates on the basis of race, color, religion, sex, handicap, familial status, country of national origin or other category protected under federal, state or local law.

(d) **Service Providers.** Broker does not warrant or guarantee products or services provided by any third party whom Broker, at Buyer's request, refers or recommends to Buyer in connection with property acquisition.

5. BUYER'S OBLIGATIONS: Buyer agrees to cooperate with Broker in accomplishing the objectives of this Agreement, including:

(a) Conducting all negotiations and efforts to locate suitable property only through Broker and referring to Broker all inquires of any kind from real estate licensees, property owners or any other source. If Buyer contacts or is contacted by a seller or a real estate licensee who is working with a seller or views a property unaccompanied by Broker, Buyer will, at first opportunity, advise the seller or real estate licensee that Buyer is working with and represented exclusively by Broker. Buyer's actions could compromise Broker's ability to obtain and retain any cooperative fees offered by the seller or the real estate licensee representing the seller if this working relationship isn't disclosed to a seller or other real estate licensee immediately.

(b) Providing Broker with accurate personal and financial information requested by Broker in connection with ensuring Buyer's ability to acquire property.

(c) Not asking or expecting to restrict the acquisition of a property according to race, color, religion, sex, handicap, familial status, country of national origin or any other category protected under law.

6. BROKER'S PROFESSIONAL COMPENSATION: Broker's professional fee is earned when, during the term of this Agreement or any renewal or extension, Buyer or any person acting for or on behalf of Buyer, contracts to acquire real property as specified in this Agreement. Most properties that Buyer will be considering will be listed in an MLS, Multiple Listing System, whereby Broker is offered a co-operative fee by means of Broker's membership in such MLS.

The amount due Broker, as noted below and referenced above, may differ from any compensation offered to Broker by a seller or a listing agent, as offered MLS co-operative fees vary and are not fixed. If the amount due is less than the amount offered to Broker the Broker will rebate the excess back to Buyer at or after closing. If the amount due is more than the amount offered to Broker, the Buyer may pay the Broker the difference directly at closing or at Buyer's option, the difference due will be included in the purchase price Buyer agrees to pay as a seller paid concession toward closing costs, escrows and buyer agent fee, and then paid

to Broker by Buyer at closing from the seller concession. If there is no offered co-operative fee, such as with a for-sale-by-owner, the total compensation due Broker will be included in the purchase price offered and paid directly to Broker at closing.

(a) Broker's professional compensation shall be determined as follows: 3.0% of the total purchase price with said compensation due and payable at closing.

7.BROKERAGE RELATIONSHIP: Buyer authorizes Broker to operate as their Buyer Agent. Broker never operates as a Designated Agent, Dual Agent or Facilitator, as defined in MA Statutes, as none is in the best interest of a buyer. Broker guarantees to provide full fiduciary duties, including Undivided Loyalty, to Buyer at all times and in every situation. Buyer and Buyer will also sign the Massachusetts Mandatory Real Estate Licensee-Consumer Relationship Disclosure, which is made a part hereof.

Buyer (_____) (_____) and Broker (_____) acknowledge receipt of a copy of this page 2 of 3 pages.

- 3 -

8.ACKNOWLEDGEMENT; MODIFICATIONS: Buyer has read this Agreement, understands its contents and has received a copy of same at the time of signing. This Agreement cannot be changed except by written agreement signed by both parties. This is a legally binding contract. If legal advice is desired, consult an attorney.

Date: _____ Buyer Name(s): _____

Address/Phone: _____

Buyer Signature(s): _____

Date: _____

Brokerage Name: Homebuyer Advisors LLC
Address/Phone: PO Box 72
Orange, MA 01364
(978) 248-9898

Signature: _____

_____, On Behalf of Broker

Buyer (_____) (_____) and Broker (_____) acknowledge receipt of a copy of this
page 3 of 3 pages.