

Report on Buyer Representation Agreements Post NAR Settlement

TERMS BUYERS
SHOULD BE AWARE OF



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August 2024

Executive Summary

In the wake of the National Association of Realtors' settlement, state and local realtor organizations and private brokerages have revamped their forms—in particular, their buyer representation agreements and seller listing agreements—to reflect the changes effected by the settlement. I have reviewed several dozen of these new forms. By and large, they are all very complicated and will not be understood by the average buyer and seller. Many of these contain terms that would come as a surprise to a buyer or seller, and terms that signal how realtors plan to circumvent the NAR Settlement. This report is intended to shine light on some of the terms in buyer representation agreements that buyers should be aware of, or that warrant additional scrutiny in light of the NAR Settlement.

I have reviewed all forms I was able to get my hands on—either because they are publicly available, have been made accessible online through videos, or have been sent to me privately. These include forms drafted or promulgated by the following associations:¹

California Association of Realtors

Texas Realtors

Florida Realtors

NC Realtors (North Carolina)

New Mexico Association of Realtors

Northwest Multiple Listing Service

Colorado Real Estate Commission

Tennessee Association of Realtors

Western New York REIS

Georgia Association of Realtors

Oklahoma Association of Realtors

Pennsylvania Association of Realtors

Minnesota Realtors

Oregon Real Estate Forms

Northern Virginia Association of Realtors

Rhode Island Association of Realtors

Massachusetts Association of Realtors

Utah Association of Realtors

¹ All forms or portions thereof on file with author.

South Carolina Realtors

Most of these forms are kept under strict lock-and-key, which means there are few opportunities for meaningful scrutiny and for buyers to understand pitfalls they may encounter when presented with these forms. I do not claim that the forms are a representative sample of all the forms out there²—but have reviewed enough of them to be able to identify patterns and problems.

Leaving aside the substance of the forms for a moment, it is important to make the same observation I made with respect to the California Association of Realtors' (CAR) forms earlier this summer: most of these forms are not understandable to the average home buyer or seller. You should not need to hire a lawyer to understand a listing agreement or buyer representation agreement.

In response to my earlier report lamenting the complexity of the forms, CAR issued a press release stating, in part:

“The assertion that the agreement is overwhelming and unlikely to be read or understood by the average seller underestimates the capabilities and responsibilities of both sellers and their real estate agents.”

“The complexity of the agreement reflects the complexity of California real estate transactions. The agreement is designed to cover various scenarios and provide clear guidelines, which ultimately benefit the seller by ensuring that all potential issues are addressed upfront.”

“Sellers are not left to navigate these complexities alone; their real estate professional is there to guide them through each provision, ensuring they fully understand the terms before agreeing to them.”³

CAR has apparently taken down its original press release, perhaps because it realized it was foolish to suggest that a contract that a law professor had trouble understanding was nonetheless accessible to everyday consumers. It was even more foolish to suggest that real estate agents—i.e., non-lawyers—could guide buyers through every provision.

These forms do not need to be this complicated. Lawyers and realtor groups have made them this complicated. They then claim that it's the buyer's or the seller's responsibility to read the forms and that consumers are fully capable of figuring out the terms. Assertions like this fly in the face of common sense and everything we know about consumer contracting.

In this report, I identify contractual provisions that buyers should be aware of when they are signing these buyer representation agreements. Specifically, I discuss:

1. Provisions that require buyers to pay compensation to their agent if a transaction does not close due to the buyer's breach. This could mean that a buyer faces a double whammy: losing their earnest money deposit and having to pay an agent for a house they didn't buy.

² Nor am I certain that these forms have been officially promulgated. I have used my best judgment based on source and timing to identify what I believe to be current versions of the agreements.

³ <https://www.inman.com/2024/07/02/listing-agreement-slammed-as-cfa-resumes-california-realtors-probe/>.

2. Provisions that contemplate the possibility of agents and buyers modifying an agreement upward to allow the agent to get more compensation than agreed to in the buyer representation agreement. I do not believe this is permitted by the NAR Settlement. Moreover, if there is extra money “on the table,” so to speak, why should it go to an agent who has already freely negotiated his fee?
3. Provisions that allow agents to collect “bonuses” from sellers. Certain sellers—particularly sellers of new home construction—offer very enticing bonuses to agents to get buyers to purchase their properties. One builder in Florida recently advertised an 8% bonus! Again, I do not believe this is permitted under the NAR Settlement. Moreover, allowing agents to collect these bonuses means that they will continue to steer their clients to these bonus-eligible properties.
4. Provisions that allow the agent to charge an extra fee if the seller is unrepresented (i.e., For Sale by Owner (FSBO)). A buyer likely will not understand what this term is all about and what a fair number would be.
5. Provisions that allow for the buyer’s agent *not* to credit the amount sought from the seller to the amount of compensation owed by the buyer. In effect, buyers could inadvertently be committing themselves to paying full compensation to their agent and permitting their agent to collect cooperating compensation as well.
6. Holdover provisions which are opaque and very difficult to figure out. It is reasonable for buyers’ agents to extend their right to compensation for a period of time. But many of these holdover provisions are a choose-your-own adventure muddle. This means that buyers may not fully understand when they are still obligated to pay their former agent.
7. A provision in one form that essentially creates a range of compensation—a minimum amount guaranteed by the buyer up to a maximum extra amount to be provided by the seller.
8. A provision in one form that appears to allow the buyer’s agent to collect whatever is being offered by the seller’s agent. The provision is confusing and seems on its face to violate the NAR Settlement by allowing for the possibility of collecting an amount exceeding the agreed-to fee.
9. Provisions that are designed to scare buyers into action or inaction.
10. Other provisions that tend to appear in these buyer agreements; and one provision that tends *not* to appear in these agreements (a statement that the agent may or will receive compensation for referrals to third-party service providers).

CONTRACT PROVISIONS IN BUYER REPRESENTATION AGREEMENTS

There are going to be hundreds (if not thousands) of different versions of buyer representation agreements floating around post-NAR Settlement. It is likely that most will be drafted using legalese and in ways that maximize benefits to brokerages. Many buyers will not be able to read and understand these documents. The New Mexico Association of Realtors buyer's agreement, for example, is seven single-spaced pages. So too is the North Carolina Association of Realtors buyer agreement. Buyers who try to read these agreements will likely not be able to fully understand all their terms.⁴ And they will not be attuned to the ways that agents might try to circumvent some of the provisions of the NAR Settlement, something that ultimately harms consumers by keeping commissions high. Below, I outline provisions that buyers should be aware of as they enter into these agreements.

COMMISSION OWED EVEN IF TRANSACTION DOES NOT CLOSE

The vast majority of buyer representation agreements I reviewed require the buyer to pay full commission if the transaction does not close due to the buyer's breach. But this obligation is often buried in fine print and written in legalese.

Here are examples of this provision:

Tennessee Realtors: Broker's fee is earned at the signing by both parties of an agreement to purchase, lease, exchange or the exercise of an option for any property(ies) as described above and is due at the closing of any such transaction or upon possession of property unless otherwise stated herein. **In the event that Buyer defaults on performance of a valid contract for sale, lease, exchange or exercised option, Broker's fee shall be due on the date of default.** Buyer agrees to pay all reasonable attorney's fees together with any court costs and expenses which real estate firm incurs in enforcing any of Buyer's obligations to pay compensation under this Agreement. The parties hereby agree that all remedies are fair and equitable and neither party shall assert the lack of mutuality of remedies as a defense in the event of a dispute.⁵ (emphasis added).

New Mexico Association of Realtors: 7. COMPENSATION EARNED AND DUE. Unless otherwise provided in Paragraph 6(A), Buyer owes Broker compensation upon the occurrence of any of the following: A. DURING THE TERM. Compensation is earned by Brokerage upon Buyer, or any other person acting on behalf of Buyer, entering into an agreement to Purchase and is due to Brokerage upon the closing of any property subject to this Agreement during the term of this Agreement, whether or not Buyer sought the assistance of Broker. **If any such**

⁴ Almost every one of these contracts is full of real estate jargon and legal jargon. The average buyer will not understand the many terms used in these agreements: broker, brokerage, licensee, agent, listing agent, dual agent, designated agent, sub-agent, facilitator, etc.

⁵ The Tennessee forms also bury the buyer's requirement to pay attorneys' fees in legal proceedings in the compensation section.

transaction fails to close because of a default by Seller, compensation otherwise earned and due will be waived, **if because of a default by Buyer, compensation earned and due under this Agreement will not be waived.** “Closing” is defined as a series of events by which Buyer and Seller satisfy all of their obligations under a Purchase Agreement, including, but not limited to, Seller’s transfer of legal title or in the case of a Seller Financing - Real Estate Contract, equitable title to the Buyer. (emphasis added).

Colorado Real Estate Commission: 7.1.1.3. When Earned; When Payable – Purchase. The Success Fee is earned by Brokerage Firm upon the Purchase of Property and is payable upon closing of the transaction. If any transaction fails to close as a result of the seller’s default with no fault on the part of Buyer, the Success Fee will be waived. **If any transaction fails to close as a result of Buyer’s default, in whole or in part, the Success Fee will not be waived; such fee is payable upon Buyer’s default,** but not later than the date that the closing of the transaction was to have occurred.

Oklahoma Real Estate Commission: 8. Failure to Close. If Seller fails to close with no fault on the part of Buyer, the Compensation shall be waived. **If the transaction does not close due to a breach of Contract of Sale by the Buyer, the Compensation shall NOT be waived and shall become immediately due and payable.** (emphasis added).

North Carolina Association of Realtors: (c) The compensation shall be deemed earned under any of the following circumstances: (i) If, during the term of this Agreement, Buyer, any assignee of Buyer or any person/legal entity acting on behalf of Buyer directly or indirectly enters into an agreement to purchase, option, and/or exchange any property of the type described above regardless of the manner in which Buyer was introduced to the property; or (ii) If, within _____ days after expiration of this Agreement (“Protection Period”), Buyer enters into a contract to acquire property introduced to Buyer during the term of this Agreement by Firm or any third party, unless Buyer has entered into a valid buyer agency agreement with another real estate firm; or (iii) **If, having entered into an enforceable contract to acquire property during the term of this Agreement, Buyer defaults under the terms of that contract.** (d) The compensation will be due and payable at distribution of proceeds from sale of the Property by the closing attorney or upon Buyer’s default of any purchase agreement. If Buyer defaults, the total compensation that would have been due the Firm will be due and payable immediately in cash from the Buyer. No assignment of rights in real property obtained for Buyer or any assignee of Buyer or any person/legal entity acting on behalf of Buyer pursuant to this Agreement shall operate to defeat any of Firm rights under this Agreement. (emphasis added).

Several standard forms are even more anti-consumer and say that commission is earned when the buyer *signs* the agreement for purchase and sale, or if the buyer breaches the buyer representation agreement. For example:

Florida Realtors: 7. COMPENSATION: **Broker's compensation is earned when**, during the term of this Agreement or any renewal or extension, **Consumer** or any person acting for or on behalf of Consumer **contracts to acquire real property** as specified in this Agreement or defaults on any contract to acquire property. This compensation is for Broker's services for Consumer. Compensation received by Broker, if any, from an owner or owner's broker for services rendered to Consumer will reduce any amount owed by Consumer per this paragraph. (emphasis added).

Texas Realtors: C. Earned and Payable: **Broker's compensation is Earned when: (1) Client enters into a contract** to buy or lease property in the market area; or (2) Client breaches this agreement. Broker's compensation is Payable, either during the term of this agreement or after it ends, upon the earlier of: (1) the closing of the transaction to acquire the property; (2) Client's breach of a contract to buy or lease a property in the market area; or (3) Client's breach of this agreement. If Client acquires more than one property under this agreement, Broker's compensation for each property acquired are Earned as each property is acquired and are Payable at the closing of each acquisition. (emphasis added).

Pennsylvania Association of Realtors: **The balance of Broker's Fee is earned if Buyer enters into an agreement of sale during the term of this Contract**, whether brought about by Broker, Broker's Licensee(s) or by any other person, including Buyer. If Buyer defaults on the terms of an agreement of sale, Broker's Fee will be paid by Buyer to Broker at that time. (emphasis added).

A buyer contracts to purchase real property at the time they enter into a purchase and sale agreement, even if that agreement is subject to contingencies. Some of these forms can be read to require the buyer to pay their agent even if the transaction does not proceed owing to failed contingencies. This may not be what was intended. But the wording of the provision can be a powerful weapon for unscrupulous actors to obtain payment where a buyer justifiably backs out of a purchase agreement.

I am not saying that it is unfair or inappropriate to include a provision that obligates a buyer to pay commission if they breach an underlying contract to purchase real estate. However, it is *very unlikely* that a buyer will contemplate that a provision like this exists in the contract. Accordingly, there must be some requirement on the part of the agent to make sure the buyer understands exactly what they are agreeing to. Most buyers understand that if they breach a contract for purchase and sale, they will forfeit their earnest money deposit; they do not anticipate that they will also have to pay tens of thousands of dollars to their agent. An obligation of this magnitude should not be buried in the fine print.

BUYER CONTRACT SAYS THAT AGREEMENT CAN BE “MODIFIED” TO INCREASE BUYER AGENT COMPENSATION

A number of contracts provide that the representation agreement can be modified to give the buyer's agent more compensation than originally agreed to—just by signing an addendum or modification agreement.

Texas Realtors: Additional Compensation: In addition to Broker's Fee specified under Paragraph 7A, Broker is entitled to the following compensation. . . . In addition to Broker's Fee specified under Paragraph 7A, **seller, landlord, or their agent may offer Broker other compensation, such as a bonus,** if Client purchases or leases certain properties. Broker will disclose the specific amount of other compensation offered to Broker. **Broker may not receive other compensation unless authorized by Client in writing. Client authorization may be made by amending this agreement** (use TXR 1505). (emphasis added).

North Carolina Association of Realtors: "(i) Firm may seek the Fee from a cooperating listing firm or from the seller, and Buyer agrees that Firm shall be entitled to receive same in consideration for Firm's services hereunder, provided that any compensation paid by a cooperating listing firm or seller shall not exceed the amount of the Fee, **unless otherwise agreed.**" (emphasis added).⁶

New Mexico Association of Realtors: IMPORTANT NOTE: Buyer's Brokerage cannot receive from one source of multiple sources . . . more than the Brokerage Compensation set for herein. While **Buyer and Buyer Brokerage may agree to adjust the amount of the Brokerage Compensation set forth herein at any time** . . . neither Buyer, nor the Buyer Brokerage, is *obligated* to change the amount of compensation established in this Agreement once this Agreement has been signed by all parties. (emphasis added).

Colorado Real Estate Commission: 7. COMPENSATION TO BROKERAGE FIRM. In consideration of the services to be performed by Broker, Brokerage Firm 118 will be paid as set forth in this section, with no discount or allowance for any efforts made by Buyer or any other person. **Unless approved by Buyer, in writing, Brokerage Firm is not entitled to receive additional compensation, bonuses, and incentives paid by listing brokerage firm or seller.** (emphasis added). . . .

Buyer Will Pay. Buyer is obligated to pay Brokerage Firm's Success Fee. **Brokerage Firm is NOT entitled to receive additional compensation, bonuses or incentives from listing brokerage firm, seller or any other source unless agreed to by Buyer in writing.**

Western New York Real Estate Information Services MLS: . . . REIS MLS MEMBERS OR PARTICIPANTS MAY NOT ACCEPT COMPENSATION FROM ANY SOURCE THAT EXCEEDS THE AMOUNT OR RATE AGREED TO WITH THE BUYER, **UNLESS THE BROKER AND THE BUYER AGREE TO SUCH ADDITIONAL COMPENSATION IN WRITING.** (bold in original, underline added)

Northwest MLS: COMPENSATION. Buyer acknowledges that there are no standard compensation rates and the compensation in this Agreement is fully negotiable and not set by law. Firm may not receive any compensation for

⁶ <https://www.ncrealtors.org/legal-ethics/forms-contracts/document-library/>.

brokerage services provided to Buyer from any source greater than the amount set forth in this Section 5 **or any subsequent amendment hereto**. (emphasis added).

In my view, the NAR settlement prohibits realtors from receiving this excess compensation.⁷ The NAR Settlement Agreement states that the compensation figure may not exceed that which is agreed to in “*the agreement with the buyer.*”⁸ This refers to the agreement in Section H.58.(vi) that the realtor has already “enter[ed] into . . . before the buyer tours any home.”⁹ This provision clearly contemplates that the agreement that sets the cap on broker compensation is the one already entered into prior to the buyer touring the home—not a subsequently modified contract.

To be clear, even if the buyer representation agreement does not refer specifically to modification, this does not mean that agents will not attempt to engage in this practice. For instance, the California Association of Realtors’ (CAR) draft buyer representation agreement from May 2024 (since superseded) provided:

California Association of Realtors: “Broker shall not receive any amount in excess of paragraph 2D(1) **unless that amount is modified in a subsequent written agreement** between Broker and Buyer at the time the overage amount is known.” (emphasis added).

The latest version of CAR’s Buyer Representation Agreement now omits specific reference to buyers’ agents modifying an agreement upward once the compensation is known. However, CAR President Melanie Baker has indicated that she believes “renegotiation” is a viable option to increase a broker’s level of compensation beyond that originally agreed to.¹⁰ And brokerages

⁷ To its credit, Pennsylvania Association of Realtors has also warned against this practice.

Practice Tip: There have been questions about whether buyer brokers can renegotiate buyer agency fees based on what a listing broker and/or seller are willing to contribute – e.g., renegotiating up if the seller side is willing to offer more than the negotiated fee (so the broker can collect more), or down if the seller side is offering less (to avoid a buyer potentially having to pay at closing). Brokers should be exceedingly cautious about this approach. The terms of the NAR settlement agreement say that buyer broker fees must be “objectively ascertainable” and may not be open-ended (e.g., “buyer broker compensation shall be whatever amount the seller is offering to the buyer”). Any buyer broker fee practice should be judged against this standard. If a buyer broker occasionally renegotiates a contract with terms that work better for the buyer and broker based on special circumstances, that may be acceptable. If a buyer broker regularly tells buyer clients something like, “we’ll just put a number in here as a placeholder then renegotiate a different number once we figure out how much we can get from the listing broker and/or seller” then that would likely be seen as a violation of the settlement terms.


PAR Standard Forms Update 2024.

⁸ *Id.* (emphasis added).

⁹ *Id.*

¹⁰ <https://www.youtube.com/watch?v=keB-Uua0zZ8> (“The NAR settlement prohibits a buyer’s broker from receiving any compensation in excess of what was specified in the buyer broker agreement, right? . . . So, Neil, follow on question, we talked a little bit about this yesterday . . . you’ve worked with the buyer for three months and you’ve established a good relationship and hopefully at this point, there’s a trust

in California are training their agents on the fact that a modification is permissible to increase compensation.¹¹ CAR has even created a new form to allow for an increase in buyer agent compensation:



MODIFICATION OF TERMS - BUYER REPRESENTATION AGREEMENT
(C.A.R. Form MT-BR, Revised 6/24)

The Buyer Representation Agreement dated _____, between _____ ("Broker") and _____ ("Principal") is modified as follows:

EXPIRATION DATE: The expiration date is changed to: _____.

NOTE: Any renewal of a buyer-broker agreement may not last longer than 3 months from the date of this Modification, unless Buyer is a corporation, LLC or partnership. Agreements exceeding the maximum allowed are void.

NOTICE: THE AMOUNT OR RATE OF REAL ESTATE COMMISSIONS IS NOT FIXED BY LAW. THEY ARE SET BY EACH BROKER INDIVIDUALLY AND MAY BE NEGOTIABLE BETWEEN PRINCIPAL AND BROKER (REAL ESTATE COMMISSIONS INCLUDE ALL COMPENSATION AND FEES TO BROKER).

COMPENSATION: The amount of compensation is changed as follows: _____.

OTHER: _____

It is important to understand the dynamics at play here and why the requirement that these modifications be in writing is insufficient to ensure voluntariness on the part of buyers.¹² In

built up. Let's just say, because we're kind of new at this that I didn't feel like I negotiated very well with the buyer, can I go back to the buyer and say, "okay I'd really like to renegotiate my compensation with you now because I feel like I've established this trust"? And what's a more appropriate timing for doing that rather than doing it at the time they see listings that may offer a little bit more? [Answer:] . . . I see what you're saying, and I'll start off with you're not necessarily going to know what the seller is going to agree to pay and you're not going to see an offer of compensation through the MLS so you're not necessarily going to know if the listing broker is willing to pay anything, right? So, you may not know that. To me the best time to have that discussion with the buyer client is before an offer is written. While you are working with the buyer after you've established that that trust and say, "you know what it looks like my value to you really exceeds what we agreed to before and so there's always the possibility of renegotiating that agreement.").

¹¹ See, e.g., Keller Williams Training on New CAR forms, <https://www.youtube.com/watch?v=SE995TU2Ckc> ("[Per the settlement, an] agreement term allowing broker to retain any excess compensation offered by a third party shall be unenforceable. [T]hat is one of the terms that we're going to be bound to in this settlement. If, let's just say for example, . . . your buyer representation agreement says that you get three apples the seller offers four apples, the most you are allowed to get are three apples. Now, what you can do, though, is you can do a modification of your buyer representation agreement to change that . . . If they're willing . . . to sign off on that that would be fine, but you probably should also explain to the buyer that by taking that higher amount it might affect the offer that they get accepted . . .").

¹² The fact remains that regardless of whether buyers consent, these modifications run afoul of the NAR settlement.

almost all cases, a buyer will be all too happy to sign a modified agreement after a guarantee of payment for the buyer’s agent has been secured. After all, it’s: a) not his money; and b) failing to sign a modification could lead to an awkward or acrimonious relationship with the agent going forward. With respect to (b), it’s important to realize that the agent’s request for a modification to the compensation comes at the same time the agent is submitting and negotiating an offer for the buyer. Why would a buyer want to alienate his agent at this pivotal moment in the process? Any statement in the form that the buyer is not obligated to agree to the modification doesn’t really mean anything in the real world because it ignores the not-so-subtle pressure on buyers to sign the modification.

The buyer likely would also not fully appreciate the personal or broader implications of signing a provision allowing his agent to receive more compensation than originally agreed to. If an extra 1% is on the table, why should that money go to the agent? Practices like this where realtors scoop up “excess” funds result in the maintenance of the commission structure that the NAR Settlement was intended to dismantle.

VARIATION: BUYER BEING ASKED TO AGREE TO SELLER-PAID BONUSES

A variation of the “let’s modify the agreement” theme is found in provisions that allow the buyer’s agent to collect bonuses from sellers (apparently, there is a belief that a bonus is distinct from compensation). Again, I do not believe this is permitted by the NAR Settlement. Buyers’ agents are permitted to only collect the amount listed in their buyer representation agreement, whether characterized as commission, a fee, a bonus, or anything else.

The North Carolina Association of Realtors’ form explicitly allows for realtors to collect bonuses:

consideration for Firm’s services hereunder, provided that any compensation paid by a cooperating listing firm or seller shall not exceed the amount of the Fee, unless otherwise agreed.

(ii) If Buyer purchases property where the compensation offered by the listing firm and/or seller is less than the Fee, or where no compensation is offered by either the listing firm or the seller, Buyer and Firm agree that Buyer will pay the difference between the Fee and the compensation offered unless prohibited by law. Prior to making an offer, Firm will timely inform Buyer if the compensation offered is less than expected the Fee. Per federal regulations, a buyer obtaining a VA loan is not permitted to pay a brokerage fee or commission in connection with the services of a buyer agent, though use of a buyer agent is permitted. Firm may seek compensation pursuant to paragraph 4(b)(i) if Buyer is seeking a VA loan.

(iii) If additional compensation, incentive, bonus, rebate and/or other valuable consideration over and above the Fee (“Additional Compensation”) is offered to Firm through the MLS or otherwise, Buyer will permit the Firm to receive it in addition to the Fee. Firm shall timely disclose the promise or expectation of receiving any such Additional Compensation and obtain Buyer’s consent confirm the disclosure in writing before Buyer makes or accepts an offer to buy. (Note: NCAR Form #770 may be used to confirm the disclosure and obtain consent of any such Additional Compensation)

_____ (initial) Buyer understands that: (1) Firm’s services are not free; (2) if listing firm or seller agree to pay Firm all or a portion of the fee, a portion of the purchase price will be paid to a listing firm who will, in turn, pay Firm as a cooperating agent as explained in ¶4(b)(i) herein; and (3) if the cooperating compensation offered is not sufficient to satisfy the Fee, then Buyer is obligated to pay the difference unless exempted by law.

NOTE: Form 770 may be used to disclose to Buyer any potential Additional Compensation and obtain Buyer’s consent to Firm. Form 220 can be used to adjust the amount of compensation offered by a listing firm in the MLS.

Notice the wording: “Firm shall timely disclose the . . . *expectation* of receiving any such Additional Compensation and obtain Buyer’s consent . . .” Notably, the consent does not need to be in writing (though the broker “may” use Form 770 if they wish). So, this is as simple as an agent saying, “Hey, builder has a policy of giving agents \$5,000. Just wanted to let you know.” I

think most buyers would not object to the agent receiving a bonus from the builder so long as they were not out-of-pocket for it.

Texas forms also reference these bonuses:

Texas Realtors: Additional Compensation: In addition to Broker's Fee specified under Paragraph 7A, Broker is entitled to the following compensation. . . . In addition to Broker's Fee specified under Paragraph 7A, *seller, landlord, or their agent may offer Broker other compensation, such as a bonus*, if Client purchases or leases certain properties. Broker will disclose the specific amount of other compensation offered to Broker. Broker may not receive other compensation unless authorized by Client in writing. Client authorization may be made by amending this agreement (use TXR 1505).

Texas Realtors have created an amendment form that expressly allows the buyer's agent to collect bonuses:



AMENDMENT TO BUYER/TENANT REPRESENTATION AGREEMENT

USE OF THIS FORM BY PERSONS WHO ARE NOT MEMBERS OF THE TEXAS ASSOCIATION OF REALTORS®, INC. IS NOT AUTHORIZED.
©Texas Association of REALTORS®, Inc. 304-2024

On or about _____, Client and Broker entered into a Buyer/Tenant Representation Agreement (the **aAgreement**):

Effective _____, Client and Broker amend the **aAgreement** as follows:

A. The "market area" in Paragraph 3G is redefined as _____

B. The date the **aAgreement** ends specified in Paragraph 4 is changed to _____

C. (For TXR 1507 only)

(1) Brokers Obligations in Paragraph 5 is changed to Full Services or Showing Services.

(2) Client does or does not authorize Broker to act as an intermediary under Paragraph 8.

Note: To change Broker's Fees, also complete Paragraph D below.

D. (For TXR 1501 and TXR 1507 only) Broker's Fees in Paragraph 7A are changed to (Complete all that apply):

(1) (Purchases) _____ % of the sales price or \$ _____.

(2) (Leases) _____ % of one month's rent or _____ % of all rents to be paid over the term of the lease or \$ _____.

E. (For TXR 1501 and TXR 1507 only) **Bonuses and Other Compensation:** In addition to Broker's Fees listed in Paragraph 7A, Broker will receive other compensation from seller, landlord, or their agent in an amount equal to \$ _____ if Client purchases or leases the following property: _____ (property address).

F. Client instructs Broker to cease providing services under the **aAgreement** on _____ and to resume providing services on: (1) receipt of further instructions from Client; or (2) _____

The **aAgreement** is not terminated and remains in effect for all other purposes.

Georgia Association of Realtors forms also allow for bonuses, and Georgia realtors are being trained to include the bonus amount in the buyer representation agreement.¹³

Georgia Association of Realtors:

a dual agency capacity, as that agency relationship is explained in Section B.3(b) below and in the CB01 ABCs of Agency. Buyer expressly consents to Broker acting in any other agency relationship offered by Broker.

4. Compensation for Professional Services of Broker ("Compensation"). *New title of paragraph*

a. Generally: Compensation to Broker(s) is negotiable and is not set by state law. However, this does not obligate individual licensees and brokerage firms to necessarily negotiate their Compensation.

b. Compensation to Buyer's Broker: Buyer agrees to pay Buyer's Broker the Compensation set forth below at the closing of any Contract to Purchase (as that term is hereinafter defined)

_____ percent (_____ %) of the sales price;

\$ _____;

(other) _____.

c. Optional Compensation from Seller or Seller's Broker to Buyer's Broker: Buyer hereby approves or disapproves Buyer's Broker receiving Compensation from Seller or Seller's Broker. Nothing herein should be interpreted as a promise by Seller or Seller's Broker to pay or offer to pay Compensation to Buyer's Broker herein.

If Buyer approves such Compensation being paid by the Seller and/or Seller's Broker to the Buyer's Broker, the maximum amount the Buyer's Broker may receive from Seller and/or Seller's Broker is as follows:

_____ percent (_____ %) of the sales price;

\$ _____;

(other) _____.

To cover any Seller-Side offered Bonuses. DO NOT LEAVE BLANK! May NOT be "Open-Ended" such as "Any Bonus offered by Seller Side"

d. Possible Reduction in Buyer's Compensation Obligation to Buyer's Broker: Any Compensation Buyer's Broker receives from Seller or Seller's Broker shall: *[Select one. The boxes not checked shall not be a part of this Agreement.]*

reduce the Compensation Buyer shall pay to Buyer's Broker dollar for dollar;

not reduce the Compensation Buyer shall pay to Buyer's Broker;

The South Carolina Association of Realtors' forms also refer to additional bonuses:

a. Brokerage Fee:

Buyer will pay Broker the following (initial only one from Compensation Amount and One from Method of Payment for Compensation). If Broker is offered a bonus in addition to the agreed upon amount below the Broker will provide the Buyer written notice of the bonus via an addendum to this agreement. The Broker may only accept the bonus if the Buyer agrees to sign the addendum:

COMPENSATION AMOUNT (initial only one):

_____ (initials) **A)** A Brokerage Fee of \$ _____ will be paid at Closing.

_____ (initials) **B)** A Brokerage Fee of _____ % of the purchase price or total lease price (renewable, if applicable) of any property purchased or leased by Buyer, including "For Sale by Owner" properties.

_____ (initials) **C)** A Brokerage Fee of _____ % of another amount and calculated by: _____

METHOD OF PAYMENT FOR COMPENSATION (initial only one):

_____ (initials) **A)** Brokerage Fee will come solely from the Buyer.

_____ (initials) **B)** Brokerage Fee will come from Buyer, less the amount Broker receives from Seller or Listing Broker

_____ (initials) **C)** Seller or Listing Broker pays Brokerage Fee and Buyer has No Obligation to Pay

b. Other: Buyer will pay Broker the following (initial any/all that apply) The following items are nonrefundable and due directly to the brokerage firm:

_____ **Retainer Fee:** of \$ _____ due and payable upon the signing of this contract. This fee shall or shall not be credited against the Brokerage fee.

¹³ It is not entirely clear how a bonus amount would be known at the outset of the representation period.

Bonuses are particularly prevalent with new-build construction. Builders do not like discounting properties because it sets a bad precedent for future sales. Instead, they often give significant bonuses to agents so that they steer their clients toward the builders' properties (something that the NAR settlement was designed to put an end to). One builder in Florida recently announced an 8% bonus for buyer agents.¹⁴

Brokerages and state realtor associations are specifically training agents on how to ensure they get these bonuses. A Texas brokerage recently explained that agents could receive bonuses exceeding the agreed commission simply by amending the agreement. He referred to this multiple times as "an escape clause":

The long form goes on to talk about additional compensation and this is very important, so let's talk about this for a moment. Let me just explain: there's a little Catch 22 that you don't want to be caught in. The NAR settlement says that you are entitled to broker compensation through the buyer tenant representation agreement and you put that amount in the buyer tenant representation agreement just as we do now. You might say 'well I want uh 3% or I want \$10,000' or whatever it is. The difference is under the NAR settlement you are not permitted to earn more than the amount specified in the buyer tenant rep agreement. So for example let's say that you put 3% in there and then you take them to a new home community where they're offering a \$10,000 BTSA [bonus to selling agent] or it's a a stale property and a resale listing and the seller has agreed to offer a \$1500 BTSA—well too bad, so sad, you don't get that money because you're not allowed to collect more than is specified in the buyer tenant rep agreement. Now there's an escape clause and I'll cover that in just a moment

Now let's get to what is really going to come up more often: the final paragraph notice regarding bonuses and other compensation in addition to broker's fee specified under paragraph 7A ... **The buyer's broker . . . may not receive other compensation unless authorized by client in writing. Client authorization may be made by amending this agreement. Okay, this is the escape clause!** You may have put 3% in there [the representation agreement] and then discovered they want to buy that new construction and **you want that doggone \$10,000 BTSA. You are not locked out from receiving it just because it's not on the original agreement! You can amend the agreement to extend your compensation to whatever degree the ... selling broker or the seller is offering okay. So, you can get paid, so don't ever forget that.**¹⁵ (emphasis added).

Another Texas brokerage is saying the same thing:

What if a builder is offering a bonus? Can I accept it? Absolutely. So, remember that the buyer's representation agreement has to be definitive in what your fee is. So if you put 3% and the Builder is offering four, you can take it. You just have to amend that . . . buyer representation agreement. Okay, so that may

¹⁴ <https://youtube.com/watch?v=2zJ5Zv0p8vI&si=emqlBjjK1bEec1er>.

¹⁵ <https://www.youtube.com/watch?v=WlvSaLdUucs>.

feel weird, . . . **Let's just get it out there -- so if a builder's offering you 4% you're entitled to that 4%, right?** You just have to amend the original buyer rep agreement. Now you may elect to give back a portion of that to your buyer if you kind of feel weird about it, because let's face it, there's not a lot of heavy lifting when it comes to new construction as much as there is with a pre-owned home. So, if you feel bad about taking that extra percent or a bonus, whatever it is, maybe you give a portion of that to the buyer in exchange for them signing the amendment.¹⁶ (emphasis added).

So did another:

[Let's say] the Builder just so happens to be generous enough to offer you a bonus or an extra percent in compensation. Can you take it if it is above and beyond 3%? And the short answer is yes, but you will need to fill out an amendment to the buyer representation agreement . . . but it is completely possible. **Agents do it all the time and that is the only way to legally get around . . . taking more than what you have [agreed to].**¹⁷ (emphasis added).

BUYER AGREES TO PAY ADDITIONAL FEE IF LISTING IS FOR SALE BY OWNER (FSBO)

At least two contracts I reviewed enabled the agent to charge an additional fee to a buyer if the seller was listing their property without an agent. This provision seems intended to discourage buyers from purchasing property from sellers who have not hired a listing agent.

The Pennsylvania Association of Realtors' form includes a blank spot for agents to have buyers pay more for their services if the seller is unrepresented. This provision actually contains blank spaces for a percentage or a flat fee for a FSBO seller *plus* an additional blank space for even more compensation.

(B) Broker's Fee, paid by Buyer to Broker, is as follows:

1. In a purchase transaction:
 - a. with a seller represented by a real estate broker (this Broker or another broker) the fee is _____% of the Purchase Price OR \$ _____, whichever is greater, AND \$ _____.
 - b. with a seller who is **not** represented by a real estate broker the fee is _____% of the Purchase Price OR _____, whichever is greater, AND \$ _____.
2. Advance Fee/Retainer: \$ _____ of Broker's Fee is earned and due (non-refundable) at signing of this Contract. This Advance Fee will be credited against any other fees stated in this paragraph unless otherwise stated here: _____
3. Other: _____
4. **Broker will not retain any amount greater than the Broker's Fee agreed to in Paragraph 2(B), regardless of the source.**

Buyer Initials: _____

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Broker/Licensee Initials: _____

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rev. 8/24; rel. 8/24

Additionally, this form does not seem to allow for the possibility of negotiating a discounted fee if the agent serves as a dual agent. The provision simply states that if the seller is represented

¹⁶ <https://www.youtube.com/watch?v=RbV7IEIG-90>.

¹⁷ <https://www.youtube.com/watch?v=erAIS777xLc>.

(either by the agent themselves or someone else) then x% or amount will be paid. This section also contains an extra blank for even more compensation.

The Northwest MLS form also allows a broker to charge more if the seller is unrepresented:

5. **COMPENSATION.** Buyer acknowledges that there are no standard compensation rates and the compensation in this Agreement is fully negotiable and not set by law. Firm may not receive any compensation for brokerage services provided to Buyer from any source greater than the amount set forth in this Section 5 or any subsequent amendment hereto. The compensation for Buyer Brokerage Firm's services (the "Compensation") shall be:

a. _____ % of purchase price; \$ _____; other: _____

b. If Buyer Broker is a limited dual agent and represents both Buyer and the seller, then the Compensation shall be (equal to the amount in subsection 5(a) if not filled in):
 _____ % of purchase price; \$ _____; other: _____

c. If the seller is not represented by a licensed real estate firm, then the Compensation shall be (equal to the amount in subsection 5(a) if not filled in):
 _____ % of purchase price; \$ _____; other: _____

Buyer's Initials _____ Date _____ Buyer's Initials _____ Date _____

Worse still, the Northwest MLS form is highly deceptive in that it "auto-fills" provisions in a way that is contrary to the interests of buyers.¹⁸

Most buyers reading the first part of the provision ("If the seller is not represented by a licensed real estate firm, then the Compensation shall be . . .") would rightfully assume that if they left the spaces blank, the number would be zero. No reasonable buyer would think that by leaving a space for compensation blank, they would be agreeing to potentially pay double the commission. By operation of the language "equal to the amount in subsection 5(a) if not filled in)" the buyer could be agreeing to a 3% fee for his agent, and an extra 3% fee if the seller is unrepresented. This is contrary to the expectations of anyone who leaves a provision blank and is the type of provision that I believe could successfully be challenged as being unfair and deceptive.

¹⁸ It also does so in its listing agreement, which is very troubling.

a. **Listing Firm Compensation.**

i. _____ % of the sales price; \$ _____; other: _____; or

ii. If the buyer is not represented by a buyer brokerage firm, the Listing Firm compensation shall be _____ % of the sales price; \$ _____; other _____ (equal to the amount in subsection 7(a)(i) above if not filled in).

b. **Buyer Brokerage Firm Compensation.** Seller acknowledges that offering compensation to a cooperating member of MLS representing the buyer ("Buyer Brokerage Firm") ("Buyer Brokerage Compensation") is not required.

Seller's Offer of Compensation. Seller offers Buyer Brokerage Compensation as follows:

i. _____ % of the sales price; \$ _____; or other _____ to Buyer Brokerage Firm, which includes another broker affiliated with Listing Firm who represents the buyer; or

ii. If the Listing Broker is a limited dual agent and represents both Seller and the buyer, _____ % of the sales price; \$ _____; or other _____ (equal to the amount in subsection 7(b)(i) above if not filled in) to be paid to Listing Firm as Buyer Brokerage Compensation.

BUYER POTENTIALLY AGREEING TO PAYING FULL COMMISSION WITH NO CREDIT FOR SELLER OFFERED COMPENSATION

At least two sets of standard forms contain a strange compensation provision which could result in an agent getting full commission from a buyer *plus* the agent collecting commission from the seller.

The Minnesota Realtors' standard buyer agreement contains the following clause:

38. Broker is authorized to negotiate and receive compensation paid by seller, or broker representing or assisting seller.

39. Any compensation accepted by Broker from seller, or broker representing or assisting seller, SHALL SHALL NOT (Check one.)


40. reduce any obligation of Buyer to pay the compensation by the amount received by seller or broker. Broker must inform

41. Buyer in writing before Buyer signs an offer to Purchase the property (utilizing *Disclosure Statement: Compensation*

42. *Disclosure to Buyer/Tenant* or other written disclosure) the amount of compensation or the basis for computing the

43. compensation.

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The Georgia Association of Realtors' buyer representation agreement contains a similar clause:

a dual agency capacity, as that agency relationship is explained in Section B.3(b) below and in the CB01 ABCs of Agency. Buyer expressly consents to Broker acting in any other agency relationship offered by Broker.

4. **Compensation for Professional Services of Broker ("Compensation").** *New title of paragraph*

New **a. Generally:** Compensation to Broker(s) is negotiable and is not set by state law. However, this does not obligate individual licensees and brokerage firms to necessarily negotiate their Compensation.

b. Compensation to Buyer's Broker: Buyer agrees to pay Buyer's Broker the Compensation set forth below at the closing of any Contract to Purchase (as that term is hereinafter defined)

_____ percent (_____ %) of the sales price;

\$ _____;

(other) _____;

New **c. Optional Compensation from Seller or Seller's Broker to Buyer's Broker:** Buyer hereby approves or disapproves Buyer's Broker receiving Compensation from Seller or Seller's Broker. Nothing herein should be interpreted as a promise by Seller or Seller's Broker to pay or offer to pay Compensation to Buyer's Broker herein.

If Buyer approves such Compensation being paid by the Seller and/or Seller's Broker to the Buyer's Broker, the maximum amount the Buyer's Broker may receive from Seller and/or Seller's Broker is as follows:

_____ percent (_____ %) of the sales price; *To cover any Seller-Side offered Bonuses. DO NOT LEAVE BLANK! May NOT be "Open-Ended" such as "Any Bonus offered by Seller Side*

\$ _____;

(other) _____;

Possible Reduction in Buyer's Compensation Obligation to Buyer's Broker: Any Compensation Buyer's Broker receives from Seller or Seller's Broker shall: *[Select one. The boxes not checked shall not be a part of this Agreement.]*

reduce the Compensation Buyer shall pay to Buyer's Broker dollar for dollar;

not reduce the Compensation Buyer shall pay to Buyer's Broker;

If "shall not" is checked, then it seems like the buyer's agent can collect full commission from the buyer and top that off with whatever commission the seller or the seller's agent is offering. This could mean that the buyer's agent earns 6% commission! While an honest agent will check "shall," the possibility remains for agents to game the system.

BUYER AGREEMENTS WITH CONFUSING HOLDOVER PROVISIONS

The buyer agreements I have seen all contain very complex holdover provisions—i.e., provisions that allow an agent to collect compensation from the buyer after the agreement has

ended. Some contracts provide for a specific time-limited holdover period (e.g., 60 days); others have a time-limited holdover period that can be interrupted if the buyer enters into a contract with another broker. Some contracts contain requirements that a broker provide a list of holdover properties, others do not. Some contracts have no endpoint for the holdover period. In short, it is very difficult for a buyer to understand what they can and cannot do after the contract expires or the contract is cancelled.

Below are some examples of these holdover provisions:

Colorado Real Estate Commission: 7.4. Holdover Period. Brokerage Firm's Success Fee applies to Property contracted for (or leased if § 3.5.2. is checked) during the Listing Period of this Buyer Listing Contract or any extensions and also applies to Property contracted for or leased within ___ calendar days after the Listing Period expires (Holdover Period) (1) if the Property is one on which Broker negotiated and (2) if Broker submitted its address or other description in writing to Buyer during the Listing Period (Submitted Property). However, Buyer Will / Will Not owe the Brokerage Firm's Success Fee under §§ 7.1., 7.2., 7.3.1. and 7.3.2. as indicated if compensation is earned by another brokerage firm acting pursuant to an exclusive agreement with Buyer entered into during the Holdover Period, and a Purchase or Lease of the Submitted Property is consummated. If no box is checked in § 7.4., then Buyer does not owe the Brokerage Firm's Success Fee to Brokerage Firm.

Florida Realtors:

8. PROTECTION PERIOD: Consumer will compensate Broker if, within _____ (if left blank, 30) days after Termination Date, Consumer contracts to acquire any property which was called to Consumer's attention by Broker or any other person or found by Consumer during the term of this Agreement. Consumer's obligation to pay Broker's fee ceases upon Consumer entering into a good faith exclusive buyer brokerage agreement with another broker after Termination Date.

9. CONDITIONAL TERMINATION: At Consumer's request, Broker may agree to conditionally terminate this Agreement. If Broker agrees to conditional termination of this Agreement, Consumer must enter a written agreement to this effect and pay a cancellation fee of \$ _____. Broker may void the conditional termination and Consumer will pay the fee stated in the COMPENSATION Paragraph less the cancellation fee if, from the early termination date to Termination Date plus Protection Period, if applicable, Consumer contracts to acquire any property which, prior to the early termination date, was found by Consumer or called to Consumer's attention by Broker or any other person.

Texas Realtors: Protection Period: "Protection period" means that time starting the day after this agreement ends and Buyer/Tenant Representation Agreement between Broker/Associate and Client, continuing for ___ days. Not later than 10 days after this agreement ends, Broker may send Client written notice identifying the properties called to Client's attention during this agreement. If Client or a relative of Client agrees to acquire a property identified in the notice during the protection period, Client will pay Broker, upon closing, the amount Broker would

have been entitled to receive if this agreement were still in effect. This Paragraph 7F survives termination of this agreement. This Paragraph 7F will not apply if Client is, during the protection period, bound under a representation agreement with another broker who is a member of Texas REALTORS® at the time the acquisition is negotiated and the other broker is paid a fee for negotiating the transaction.

Pennsylvania Association of Realtors: (G) If Buyer enters into an agreement of sale for a property after the Ending Date of this Contract, Buyer will pay Broker's Fee if: 1. The agreement of sale is a result of Broker's actions during the term of this Contract, OR 2. The property was seen during the term of this Contract, AND 3. Buyer is not under an exclusive buyer agency contract with another broker at the time Buyer enters into an agreement of sale.

Oregon Real Estate Forms: Fee. Buyer will pay Firm a fee of (select and complete one) \$ ____ or _____% of the purchase . . . if, during the Term, or during any extension of the Term, or within ___ (one hundred eighty [180] calendar days if not filled in) after its expiration of termination, Buyer enters into an Acquisition agreement regardless of whether Buyer enters into an Acquisition agreement because of the efforts of Buyer's Agent . . .

While some of these provisions are reasonable and tailored (to the extent that a buyer could even understand them), some are unconscionable. Take the Oregon Real Estate Forms provision, for example. Imagine a buyer being committed to paying an agent for six months after termination—even if the agent had absolutely no involvement in the process. One could easily envision a hapless buyer getting stuck in a situation where they owe two commissions.

PROVISIONS THAT GUARANTEE A MINIMUM LEVEL OF COMPENSATION UP TO A MAXIMUM (RANGES)

At least one state realtor association is structuring their buyer representation agreements in a way that most certainly violates the NAR settlement. There seems to be widespread agreement that compensation “ranges” are not permitted in buyer representation agreements. The number needs to be clearly ascertainable and not open ended. The Georgia Association of Realtors has crafted a provision where the buyer agrees to a set fee (“three apples”) and then they also agree that the agent can collect more money (“ten apples”) from the seller or the seller's agent.

Here are the relevant forms and training materials:

Let's Start with What Buyer Agrees To

NOTE: AMOUNTS ARE FOR ILLUSTRATION ONLY

- ▶ Buyer agrees to pay Buyer's Broker 3 apples for their services
- ▶ Buyer agrees that Buyer's Broker may receive a MAXIMUM of 10 apples – i.e. up to 7 ADDITIONAL apples paid by someone other than Buyer
- ▶ Buyer agrees that ANY Number of apples paid to Buyer's Broker would be subtracted from their obligation to pay Broker 3 apples

Preparation by Dana Sparks, Qualifying Broker, Maximum One Greater Atlanta, REALTORS® – 61

Buyer Brokerage Reflecting Above Example

Buyer expressly consents to Broker acting in any other agency relationship entered by Broker.

4. **Compensation for Professional Services of Broker ("Compensation").** **FOR EXAMPLE, ...**

a. **Generally:** Compensation to Broker(s) is negotiable and is not set by state law. However, this does not obligate individual licensees and brokerage firms to necessarily negotiate their Compensation.

b. **Compensation to Buyer's Broker:** Buyer agrees to pay Buyer's Broker the Compensation set forth below at the closing of any Contract to Purchase (as that term is hereinafter defined)

3 (apples) percent (_____ %) of the sales price; **NOTE: AMOUNTS ARE FOR ILLUSTRATION ONLY**

\$ _____;

(other) _____;

c. **Optional Compensation from Seller or Seller's Broker to Buyer's Broker:** Buyer hereby approves or disapproves Buyer's Broker receiving Compensation from Seller or Seller's Broker. Nothing herein should be interpreted as a promise by Seller or Seller's Broker to pay or offer to pay Compensation to Buyer's Broker herein.

If Buyer approves such Compensation being paid by the Seller and/or Seller's Broker to the Buyer's Broker, the maximum amount the Buyer's Broker may receive from Seller and/or Seller's Broker is as follows:

10 (apples) percent (_____ %) of the sales price;

\$ _____;

(other) _____;

d. **Possible Reduction in Buyer's Compensation Obligation to Buyer's Broker:** Any Compensation Buyer's Broker receives from Seller or Seller's Broker shall: *[Select one. The boxes not checked shall not be a part of this Agreement.]*

reduce the Compensation Buyer shall pay to Buyer's Broker dollar for dollar;

not reduce the Compensation Buyer shall pay to Buyer's Broker;

special exceptions to the Compensation paid from Buyer to Buyer's Broker, as set forth below: _____

The general counsel of the Georgia Association of Realtors said earlier this summer that:

ANSWER: Since the written agreement between the buyer and broker's broker limits the buyer broker's commission to two percent, this is the total amount that the buyer's broker can receive unless the buyer agrees otherwise. Of course, the

buyer's broker can ask the buyer's [sic] to amend their agreement, and hopefully, the buyer will not object to that. The GAR Forms Committee is exploring ways to get the buyer to pre-agree to a maximum amount paid by the buyer, but where the buyer's broker can get an additional pre-agreed amount from the seller or listing broker.¹⁹

This provision will almost certainly fail scrutiny. Yet, until the provision is challenged, it remains in the contracts—enabling buyers' agents to walk away with outsized commissions.

PROVISIONS WHICH SEEM TO SAY THE AGENT WILL ACCEPT WHATEVER IS BEING OFFERED BY COOPERATING BROKER

One contract seems to be in direct contravention of the NAR Settlement's mandate that the buyer representation agreement sets the maximum level of compensation for the buyer's agent. The contract appears to allow the buyer's agent to collect more compensation than they negotiated with the buyer.

The Western New York REIS draft buyer agreement includes a convoluted compensation section which reads:

(CHOOSE ALL THAT APPLY)

(A) Commission. Buyer shall pay Broker a commission (the "Commission") which is the greater of \$ _____ or _____ % of the total purchase, exchange, option or aggregate lease price (and renewals if applicable) of any Property purchased, exchanged, optioned or leased by Buyer. This Commission shall be due upon entering into a contract or lease with the seller/exchange party/landlord or option grantor and payable upon closing of the contract of sale, exchange, exercise of option, or lease. If such contract of sale, exchange, option or lease fails to close due to default by the Buyer, this Commission shall become immediately due and payable to Broker. Broker shall use Broker's best efforts to obtain payment of the Commission from the proceeds of the transaction, but Buyer shall have the obligation to pay Broker the Commission set forth in this Agreement, if Broker does not obtain payment of such fee out of the proceeds of the transaction. If the Property is listed on the REIS MLS, any MLS or otherwise, the Broker will accept a fee or compensation equal to the fee or compensation offered to a cooperating broker, but in no event less than the amount stated above as the Commission. If such fee or compensation, or any portion thereof, is paid by the owner, seller, exchange party or landlord's agent as a convenience of the transaction or otherwise, Buyer will be credited by the Broker for the amount so paid.

The draft provision states that for MLS listed properties, the buyer's agent "will accept a fee or compensation equal to the fee or compensation offered to a cooperating broker, but in no event less than the amount stated above as the Commission." This presumably allows the agent to collect *more* than the number agreed to in the buyer representation agreement, something that is not allowed by the settlement. It could be that this was not the intention of the provision; the clause could simply refer to the fact that the buyer's agent will first seek compensation from the listing broker. However, provisions like this sow confusion for agents and buyers.

¹⁹ <https://www.qgdigitalpublishing.com/publication/?m=58779&i=820682&p=14&ver=html5>.


“SCARY” WARNINGS

Some of the forms contain provisions in ALL CAPS and **bold** which may scare buyers into acting a certain way. For instance, the Minnesota Realtors forms have the following “CAUTION:”


50. **CAUTION: BUYER'S ACTIONS IN LOCATING A PROPERTY MAY AFFECT PAYMENT OF COMPENSATION BY**
 51. **SELLER(S) AND MAY THEREFORE OBLIGATE BUYER TO PAY ALL OR PART OF THE COMPENSATION**
 52. **IN CASH AT CLOSING. FOR EXAMPLE: THE ACT OF GOING THROUGH AN OPEN HOUSE**
 53. **UNACCOMPANIED BY BUYER'S BROKER OR LICENSEE REPRESENTING BUYER; OR SIGNING**
 54. **A PURCHASE AGREEMENT THROUGH ANOTHER BROKER OR WITH OWNER (FOR SALE BY**
 55. **OWNER) MAY REQUIRE BUYER'S PAYMENT OF THE FULL COMPENSATION TO BUYER'S BROKER.**

At least one portion of this statement is not accurate. A buyer who has signed a representation agreement may attend open houses; they do not need to be accompanied by their broker to each and every open house. A provision like this keeps the buyer wholly reliant on their agent in their home search.

New Mexico has particularly frightening warnings for unrepresented buyers:



NEW MEXICO ASSOCIATION OF REALTORS® — 2024
NOTICE TO UNREPRESENTED BUYER



INTENDED USE OF FORM

This form is to be used by a Listing Broker/Brokerage when a buyer has elected **NOT** to work with the Listing Brokerage OR with another buyer's brokerage and has elected to represent themselves in the transaction.

Brokerage: _____
 Broker: _____
 Qualifying Broker Name and License No.: _____
 Property located at: _____
Address (Street, City, State, Zip Code)

Legal Description
 or see metes and bounds or other legal description attached as Exhibit _____, _____ County(ies), New Mexico
 (Property).

▲ ATTENTION BUYER ▲

IMPORTANT NOTICE TO BUYER FROM LISTING/SELLER'S BROKERAGE AND IF APPLICABLE, THE LISTING/SELLER'S BROKER'S TRANSACTION COORDINATOR, AND BUYER'S AFFIRMATION

NO BUYER BROKER REPRESENTATION. By your signature below, you affirm the following:

- You have represented to the Listing Broker that you do not have a Buyer's Broker; AND
- You have been advised by the Listing Broker/Brokerage to retain a broker to represent you in the transaction; AND
- Despite this advice, you have elected **NOT** to work with a buyer's broker in this transaction; AND
- You will be representing yourself in this transaction.

As such, I, as well as any transaction coordinator that I have engaged, will be working **STRICTLY** on behalf of the Seller throughout this transaction.

BROKER DUTIES. I, and any transaction coordinator involved, owe you the Broker Duties listed under **Section A** on cover page I of this Notice; however, I/we **DO NOT** owe you the Broker Duties listed under **Section B** on cover page I of this Notice.

NO SERVICES: I/we will present all offers submitted (unless otherwise directed in writing by the Seller) and inform the Seller(s) of any material information you provide to me/us, but I/we will **NOT** be providing you services in this transaction. Among the services I will **NOT** be providing are the following (**Please Note: this is NOT an all-inclusive list**):

1. Providing you with relevant market information;
2. Assisting you in drafting an offer or any counteroffer, notices, or other information;
3. Assisting you in evaluating any counteroffer;
4. Providing you with opinions or advice;
5. Providing you with information related to any contractual duty you may have under the Purchase Agreement;
6. Assisting you in meeting any deadline you are required to meet under the Purchase Agreement;
7. Arranging for the completion of any obligations you may be required to meet under the Purchase Agreement; or
8. Providing you with information related to service providers, such as title companies, mortgage companies, insurance

Notice all the scare tactics:

- Caution icons
- ALL CAPS AND BOLD

- “We have advised you to get representation and ‘despite this advice’ you ‘have elected NOT’ to hire a broker”
- “We may not give you the forms you need”
- “And, by the way, you may not be saving the seller any money”²⁰

In my view, these forms are not motivated by a desire to protect an unrepresented buyer (or even protect the brokerage from liability). They are designed to scare someone into hiring an agent.

OTHER PROVISIONS TO BE AWARE OF

This report is by no means an exhaustive list of contractual provisions that may be problematic from a buyer’s perspective. Other provisions of potential concern include the following:

- Dispute resolution clauses (arbitration or mediation) barring litigation
- Attorneys’ fees provisions
- Dual agency provisions where a buyer pre-authorizes a conflict of interest²¹
- Termination provisions (or, more accurately, the absence of termination provisions)

²⁰ Quotes added by author to translate forms into plain English.

²¹ Or dual agency provisions which are virtually impenetrable. *See e.g.*, Pennsylvania Association Realtors form:

DUAL AGENCY Buyer agrees that Broker and Broker’s Licensee(s) stated above may also represent the seller(s) of the property Buyer might buy. A Broker is a Dual Agent when a Broker represents both Buyer and a seller in the same transaction. A Licensee is a Dual Agent when a Licensee represents Buyer and a seller in the same transaction. All of Broker’s licensees are also Dual Agents UNLESS there are separate Designated Agents for Buyer and a seller. If the same Licensee is designated for Buyer and a seller, the Licensee is a Dual Agent. Buyer understands that Broker is a Dual Agent when Buyer is viewing properties listed by Broker.

4. DESIGNATED AGENCY Designated Agency is applicable, unless checked below. Broker designates the Licensee(s) stated above to exclusively represent the interests of Buyer. If Licensee is also the Seller’s Agent, then Licensee is a DUAL AGENT. Designated Agency is not applicable.

5. BROKER’S SERVICES TO OTHERS (A) Broker may not take action that is inconsistent with Buyer’s interests. However, Broker may provide services to a seller for which Broker may accept a fee. Such services may include, but are not limited to, listing property for sale; representing the Seller as Seller Agent; deed/document preparation; ordering certifications required for closing; financial services; title transfer and preparation services; ordering insurance, construction, repair, or inspection services. Providing such services is not in itself a breach of Broker’s fiduciary duty to Buyer. (B) Broker/Licensee may show the same properties to other buyers and may represent those buyers in attempts to purchase the same property that Buyer wishes to purchase. Broker does not breach a duty to Buyer by showing a property Buyer is interested in to other prospective buyers. (C) It is a conflict of interest when Broker or Licensee has a financial or personal interest in the property and/or cannot put Buyer’s interests before any other. If Broker, or any of Broker’s licensees, has a conflict of interest, Broker will notify Buyer in a timely manner.

- “Junk fees” provisions²²
- Provisions which bind a buyer to a long-term (greater than 3 months) contract with an agent.

Additionally, these forms are notable for what they do *not* contain: provisions which let the buyer know about any monetary incentives or kickbacks the realtor receives from referrals. For instance, the Minnesota Association of Realtors buyer agreement provides:

After a purchase agreement for the property is signed, arrangements must be made to close the transaction. Buyer understands that no one can require Buyer to use a particular person in connection with a real estate closing and that Buyer may arrange for a qualified closing agent or Buyer's attorney to conduct the closing.

Buyer's choice for closing services: *(Check one.)*

Buyer directs Broker to arrange for a qualified closing agent to conduct the closing.

Buyer shall arrange for a qualified closing agent or Buyer's attorney to conduct the closing.

(Buyer's Initials)

(Buyer's Initials)

The forms should disclose that the agent may receive compensation for these third-party referrals. Most buyers are not aware that their agent, who is already getting paid thousands of dollars, could be making even more money off them. This fact may encourage buyers to shop around and go with an independent professional.

Conclusion

Most buyer forms are complicated and confusing. Buyers will not be able to understand them and will likely get burned by provisions they did not anticipate. I expect this to happen, for example, with clauses that require a defaulting buyer to pay their agent's commission. If a buyer is considering breaching a contract to purchase a home—perhaps because they lost their financing, or their life circumstances changed—they would not be aware that that they owed their realtor for the failed sale. Yet almost every single contract includes that as the default provision.

There are provisions in these forms that seek to circumvent the NAR settlement. Many forms specified that realtors could seek to modify an agreement to increase their compensation if the seller or seller's agent was offering more than the buyer agreed to. First, buyers will be pressured into signing these modifications for fear of compromising their relationship with their agent; this is suggestive of economic duress. And second, if there is extra money “on the table,” why should that money go to a non-participant in the transaction? The buyer's agent has already agreed to the fee they are charging. Why should they be entitled to more? These modification provisions put the agent's financial interests over those of the client.

One particularly egregious form is that promulgated by the Northwest MLS which “auto-fills” a number for a buyer to pay when a space is left blank. A provision like this will almost certainly

²² The draft Northern Virginia Association of Realtors buyer agreement, for instance, provides a space for commission, plus a retainer fee, plus a “service fee.” The South Carolina Association of Realtors' form also has spaces for commission, plus a retainer fee, plus an “administrative fee.”

not withstand contractual scrutiny. But buyers will fall victim to it for the time being (until such term is challenged).

The NAR Settlement has ushered in new rules and realtor practices unfamiliar to home buyers and sellers. These forms just add to the confusion and potential for exploitation. I would ask regulators and those drafting these forms: Do you think your mother or father would understand this? Would you want your son or daughter to sign these forms? If the answer to either of these questions is no, then it is time for a do-over.

About the Author

Tanya Monestier joined the University at Buffalo Faculty of Law in July 2022 as a Professor of Law. She teaches Contracts, Sales, and Conflict of Laws. Monestier's work has been published in leading academic journals, including *Cornell Law Review*, *Wisconsin Law Review*, *Boston University Law Review*, *Cardozo Law Review*, *American University Law Review*, *Hastings Law Journal*, and the *Ohio State Law Journal*. Monestier's academic work has been cited by numerous trial and appellate courts, including by the Supreme Court of Canada, the Second Circuit Court of Appeals, the Ninth Circuit Court of Appeals, and dozens of federal and state courts. Her amicus brief was recently quoted by the United States Supreme Court in *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2054 (2023) (Justice Alito, concurring). She is a Staff Editor for the *American Business Law Journal*.

Monestier has written articles in the areas of real estate and consumer protection. Her article, *Fixer Upper: Buyer Deposits in Residential Real Estate Transactions*, 80 OHIO ST. L. J. 1149 (2019) argues that buyer deposits often operate as unlawful penalties. The article is cited in a leading Property Law case book. Monestier's follow-up article, *Cake-and-Eat-It-Too* clauses was recently published in *Wisconsin Law Review* (*Cake-And-Eat-It-Too Clauses*, 2024 WISC. L. R. 87 (2024)).

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