



Stoel Rives<sup>LLP</sup>

# Innovations in Real Estate Brokerage – What Was, What Is, and What Will Be

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# Introduction

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- Real estate brokerage has undergone seismic change in the last year – both in Washington and nationwide.
- Where did it start, where are we now, and where are we going?
- Caselaw Update

# Background

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- The “old days”
- Rules required listing brokers to make blanket unilateral offers of compensation to buyer’s brokers when they entered listings into an MLS.
  - Feature of both NAR and unaffiliated MLSs.

# Background

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- Compensation Opaqueness
- Listing brokers were required by rule to make such offers on behalf of sellers – sellers were minimally involved (if at all)
- Even worse for buyers – no information about broker compensation
- “I work for free”

# DOJ Investigations and Class Action Lawsuits

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- Allegations: NAR and MLSs conspired with brokerages to promulgate and perpetuate rules in violation of the Sherman Act, inflating sellers' costs and precluding buyers' participation in compensation discussion
- Preliminary rulings from the judge went against the defendants at every turn
  - Motions to dismiss denied – confirmation of plaintiffs' legal theories
  - Per se antitrust violation
- Sitzer/Burnett Trial: \$1.78 billion jury verdict

# Washington Agency Law Revisions

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- Attention to buyer agency and availability of information about broker compensation
- Pre-2024
  - Presumption of buyer agency if you don't represent the seller
  - No written agreement required

# Washington Agency Law Revisions

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- Buyer representation agreement
  - Required at the outset of brokerage relationship
  - Must identify compensation to be paid to the broker
  - Prerequisite to compensation
- Full disclosure about offers and payments of compensation → transparency and opportunity for buyers & sellers to negotiate compensation with their agent
- Changed to “limited dual agency”
- Clarification of general duties and new pamphlet

# Settlement of Class Actions

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- Announced in March 2024 after parade of losses
- Terms
  - \$418 million paid by NAR
  - Covers Realtors, Realtor MLSs, and small brokerages
- Significant monetary payments by brokerages and MLSs who elect to opt in to the settlement
- Practice changes



# Broker Practice Changes

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- Mandatory buyer agreements before “touring a home”
  - Must address compensation
  - Broker can’t receive compensation from any source that exceeds the amount in the agreement with the buyer
- May not represent that services are free (unless they are)
- Listing brokers must disclose to sellers and obtain the seller’s approval of any payment or offer of payment that the listing broker or seller will make to a buyer broker

# Broker Practice Changes

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- Brokers must disclose to buyers and sellers that commissions are negotiable and not set by law
- Brokers must not filter out or restrict listings based on the existence or level of compensation offered to the buyer broker (Contradiction regarding whether a buyer can instruct a broker to filter out listings based on compensation)

# MLS Practice changes

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- No more offers of compensation in the MLS
- Other practice changes that resemble broker practice changes (e.g., requirement of buyer representation agreements)
- Applies to MLSs that are covered by the settlement

# Settlement Status

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- Announced in March; opt-in decisions were made in June, and practice changes were implemented in August
- Nothing is official yet
  - Court has issued preliminary approval, but the hearing on final approval will not occur until late November
  - DOJ is expected to weigh in but has not done so yet
- Tension/Conflict with state law
  - Washington – timing of buyer representation agreement
  - Colorado – real estate regulators concluded that touring a home doesn't require representation agreement period.

# Washington Dichotomy

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- NWMLS and CBA – not covered by settlement
- Other residential MLSs – covered
- Eastern Washington will be a mix
  - NWMLS and CBA – still publish offers of compensation
  - Other MLSs – no published offers of compensation. But offers can be made elsewhere and sellers can & will still agree in the PSA to pay buyer broker compensation

# Washington Law vs. Settlement

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- Washington law requires broker to disclose compensation they have been offered by another party
  - How will they comply with that obligation when compensation is not published? Where will they get the information?
- What about referral fees?
  - Washington law currently specifically allows brokers to be paid referral fees without a services agreement

# Forms Revisions

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- Residential
  - NWMLS Form 21 – accommodates all scenarios
    - Specific Term 17 (Buyer Brokerage Compensation): One space for offer amount, one space for amount to be paid
    - Note that this form will now explicitly be used by parties to negotiate buyer broker compensation

17. **Buyer Brokerage Compensation:**  ;  Addendum for Buyer Credit  
(a) Seller's Offer (if any) (b) Amount to be Paid by Seller

- Other MLSs – no offers of compensation, but can still pay

# Forms Revisions

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- Commercial
  - CBA PSA form – similar, shows compensation offered/paid by seller



# Take Aways

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- Commission disputes
  - More important than ever not to do anything without joint instructions from the buyer and seller

# Caselaw

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- Mezzanine Properties, Inc. v. BKCO Title and Escrow, LLC, et al. (Washington Court of Appeals – March 11, 2024)
- Unpublished Opinion
- Residential seller (Apex) hired Keller Williams as listing agent to sell property in Bellevue
- Commission Dispute

# Mezzanine v. BKCO – Facts

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- Residential seller (Apex) hired Keller Williams as listing agent to sell property in Bellevue
- Listing Agreement: 5% listing commission with 2.5% to a cooperating buyer's agent
- PSA with Derek and Juiling Edmonds (buyers)
  - BKCO escrow – closing agent
  - Held \$131,625 as total brokerage commission

# Mezzanine v. BKCO – Facts

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- Escrow settlement statement
  - \$58,000 to Listing Firm
  - \$73,125 to Buyer Broker Firm
- Listing Firm disputed settlement statement
- Addendum to Listing Agreement: “The current tenant of the property, Derek Edmonds and Juiling Edmonds holds a right of first refusal to purchase the property. They and their broker are excluded from a selling office commission should they successfully close on the property.”

# Mezzanine v. BKCO – Claims

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- Buyer broker firm sued listing firm and escrow
- Claims: breach of contract, fraud, conversion, breach of fiduciary duties, breach of good faith and fair dealing, unjust enrichment, tortious interference, CPA, Uniform Voidable Transactions Act, Escrow Agent Registration Act
- Listing firm asked court to force arbitration at NWMLS
- Escrow moved for summary judgment

# Mezzanine v. BKCO – Trial Court

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- Ordered arbitration of claims against Listing Firm
- Ordered Escrow to deposit disputed funds into court registry
- Granted Escrow's motion for summary judgment
- NWMLS arbitration panel ruled in favor of KW
- Buyer Broker Firm appealed everything

# Mezzanine v. BKCO – Appeal

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- Buyer Broker Firm asked arbitration award to be vacated
  - Legal system's strong support for arbitration made this a simple issue – trial court affirmed.
- Buyer Broker Firm asked court to reverse dismissal of claims against Escrow
  - Court of Appeals agreed – reverse trial court

# Mezzanine v. BKCO – Decision

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- Escrow's SJ motion in lower court had asked for dismissal of all claims for the same reason: Escrow disclaimed any interest in the funds
  - Lower court granted motion
    - Written order does not say why
    - Escrow said it was because the funds had been deposited into the court registry – Escrow no longer had them
  - Court of Appeals disagreed



# Mezzanine v. BKCO – Decision

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- Buyer Broker Firm asserted numerous claims, including fraud, CPA violation, and breaches of common law duties
- Escrow “fails to show that any of those causes of action turn on its continued possession of the disputed commission”

# Mezzanine v. BKCO – Decision

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- Correct decision?
- Buyer Broker Firm still must prove its claims
- Would this case happen today?
  - Buyer Broker Firm would be entitled to compensation only if it had a buyer rep. agreement

# Mezzanine v. BKCO – Lessons

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- What could escrow company have done?
  - Court highlighted that BKCO put Mezzanine off and told them to talk to KW
  - Clear and even-handed communication with both parties is essential
    - Mezzanine alleged “collusion” between escrow and listing firm

# THANK YOU!

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