



SCHWARTZ *Report*

DIRECT: 302-234-5202 • OFFICE: 302-239-3000

www.charlieschwartz.com

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KEEP CALM AND CARRY ON

We should adopt the watch words of those World War II Londoners during the Blitz: “Keep Calm and Carry On”. Perhaps that analogy is apt in light of the latest legal blitzkrieg launched at the real estate industry. This past August I asked myself do recent events point to a brave new world for real estate or a return to some form of the old? No one yet knows though there are plenty of opinions and schadenfreude to go around. Don’t let your heart be troubled; have confidence in your past success at overcoming obstacles put in the way of service to our buyers and sellers. I’d liken this time of uncertainty to the COVID lockdowns of 2020 when we had to adapt showing procedures to conform to the rules promulgated by the various state and local jurisdictions where we do business, in person, not in person, mask on, mask off, etc. You remember the drill. We worked it out and many more people than predicted successfully bought and sold.

I am, of course, referring to the tumult surrounding the implementation of terms of the March 2024 settlement of the Burnett vs National Association of REALTORS® (NAR®) litigation. We know a few things at this stage. The settlement agreement prohibits the various Multiple Listing Services from publishing brokers’ offerings of compensation to buyers’ agents on their platforms. Sellers can still make such offers via other means, but transparency has to be the key. We must reemphasize that commissions are negotiable, which they always have been, and that buyer agency services are not free. Representing buyers without a signed buyer agency agreement will no longer be permissible. These are the highlights though there are many other permutations of the settlement whose practical implications remain to be worked out. For example, how will the settlement’s required changes interact with the various states’ interpretations of the agency relationship? Delaware still has “presumed agency”, which means that if I begin working with someone I am presumed to be their agent, absent any other evidence to the contrary. Maryland has had mandatory buyer agency representation agreements since 2016. Pennsylvania is somewhere in-between.



The crux of the issue, however, is how is this going to impact the buying and selling public, which at this juncture, remains, for the most part, blithely unaware of the changes about to be imposed on them. Every type of business has its own unique operating mores, and the sale of real estate is no exception. What works for the legal profession might not be a good practical model for consumers of real estate services. Some buyers, the more sophisticated ones perhaps, will not care if they go unrepresented into a transaction, especially if they don’t have to pay anything to do so.

Others, the first-time buyers, for example, will be doing themselves a disservice if they go unrepresented into the buying process, which involves a whole lot more than signing a few papers. But stretched thin financially to purchase their first home, they may elect to do so. That’s not a good idea and thankfully sellers can still help out by negotiating some form of buyer assistance which could then be used as compensation for a buyer’s agent.

A further implication goes to the industry as a whole. Are real estate commissions too high? Maybe yes, maybe no, but they certainly are not in every case. One argument used by the Consumer Federation of America is that they are when compared to what estate agents are paid in Great Britain, parts of Europe or Australia. But those estate agents offer only limited services to the buyer or none at all. Why is this even relevant, as their business models are as different as their fees? The comparison is one of a no-service model to a full-service model. It’s like saying an Olds is a Rolls. Yes, they are both automobiles, yet on a completely different level. After reading more than 10,000 of our buyer/seller surveys and talking with the agents involved over the last twelve years or so, I can’t recall a single one where the parties involved wanted less service. Again, every business has a different model. The plaintiffs in the Burnett suit implied that those sellers who did not pay a “going rate” commission were somehow being shunned through the MLS. They infer that those systems colluded, thereby enabling agents to steer buyers around those sellers who did not pony up. This flies in the face of the fact that online property information is available everywhere.

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A look at the sales data from the Bright MLS service refutes the assertion. According to Brian Donnellan, president and CEO of Bright MLS, the second largest such entity in the country behind CRMLS in California, says that based on their sales data, there is no correlation between sales commissions and sales activity. Bright MLS analyzed over one million homes sales through its system, covering the period from 2020 through 2023. Mr. Donnellan noted that: "If agents were steering buyers to homes with higher buyer agent commissions, then we would expect to see homes with lower commissions take longer to sell and homes with higher commissions sell more quickly. Instead, our analysis shows effectively no relationship between the offer to pay a buyer's broker and the days a home took to sell." The concept of the seller not paying a buyer's agent at all has, however, not been tested and remains to be worked out in the market place for real estate services. My

guess is that sort of cram down will not work, especially when the market becomes less of a seller dominated one than it is today. Sellers will then need all the exposure they can get. I remember my old high school shop teacher quipping that people go to the hardware store to buy quarter inch drills, not because they want quarter-inch drills so much as they want quarter-inch holes. It's the same situation here with buyers wanting to buy and sellers wanting to sell. Handing their agents a different, more convoluted set of policy and procedural tools should not hinder them from getting the outcome they want. I have always believed that a real estate transaction should never descend into an adversarial situation. Each side should come out a winner in their quest for market value if things are handled right. So keep calm and carry on!



Charles E. Schwartz II, CRB
7234 Lancaster Pike, 100A
Hockessin, DE 19707
302-234-5202
Fax 302-234-5212
cschwartz@psre.com
www.charlieschwartz.com
Licensed in DE, PA & MD

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www.charlieschwartz.com

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