

Hot Topics in Broker Risk Reduction

May 2024 | NAR Legal Affairs

**CLASS ACTION SETTLEMENT | ANTITRUST | CYBERCRIME & WIRE FRAUD
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TCPA & DNC: TEXTING AND CALLING**

CLASS ACTION SETTLEMENT

On March 15, 2024, NAR reached a proposed settlement agreement that would end litigation of claims brought on behalf of home sellers related to broker commissions. The agreement would resolve claims against NAR, [over one million NAR members](#)¹, all state/territorial and local REALTOR® associations, all association-owned MLSs², and brokerages with an NAR member as principal that had a residential transaction volume in 2022 of \$2 billion or below.

The proposed settlement, which is subject to final court approval (a decision which we expect later this year), makes clear that NAR continues to deny any wrongdoing in connection with the Multiple Listing Service cooperative compensation model rule that was introduced in the 1990s in response to calls from consumer protection advocates for buyer representation.

Under the terms of the agreement, NAR will implement several practices changes, to be effective on August 17, 2024, including but not limited to: (1) removing offers of cooperative compensation from the MLS; and (2) requiring an MLS Participant working with a buyer to obtain a written agreement prior to touring a home listed on the MLS. In addition, if approved, NAR will pay \$418 million over approximately four years.

¹ NAR's release covers all members except: (1) independent contractors or employees of HomeServices of America or one of its affiliates; and (2) employees of the remaining corporate defendants in the *Gibson/Umpa* cases: eXp Realty, LLC; eXp World Holdings, Inc.; Hanna Holdings, Inc.; HomeSmart International, LLC; Howard Hanna Real Estate Services; Redfin Corporation; United Real Estate; or Weichert, Realtors®. HomeServices of America announced its own settlement on April 26, 2024.

² Association-owned MLSs must opt in to the settlement by June 18, 2024 by submitting [Appendix B](#) (instructions provided [here](#)).

Call to Action

1. Continue having transparent conversations with consumers about the value NAR members bring to the transaction, both on [the listing side](#) and the [buyer's side](#) and how real estate professionals are paid.
2. Review your listing agreements and buyer agreements to ensure the terms and disclosures required by the settlement are included by no later than August 17, 2024. Refer to [these FAQs](#) for more details.
3. Take steps to ensure that active listing and buyer agreements that remain effective after the practice changes without an executed sales contract comply with the practice changes required by the settlement. Necessary changes could be addressed through an amendment or separate disclosure forms, for example. Buyer brokers may also wish to have a written agreement with the listing broker to confirm any offer of compensation.
4. If your brokerage had a residential transaction volume of more than \$2 billion in 2022, and you wish to opt in to the proposed settlement, take action by June 18, 2024 by submitting Appendix C (a fillable [appendix](#) and [instructions](#) are available).
5. Use the fact sheets, FAQs, social media toolkit and other resources at [facts.realtor](#) to educate consumers about compensation and the upcoming requirement to use written agreements when a buyer works with a MLS participant.

Resources

- [facts.realtor](#): Access all the details about the proposed settlement in the *Sitzer-Burnett* case, such as a copy of the settlement agreement, FAQs, a timeline, and more.

ANTITRUST

Understanding the principles of antitrust law is critical for both brokers and agents, not only to protect the brokerage from costly antitrust claims, but to best serve consumers in their homeownership journey. Keep in mind that brokers may be held liable for the anticompetitive behavior of their salespeople and staff, so having an antitrust compliance program in place to educate and train staff is important. Business decisions should always be made unilaterally and independently, and never as a result of an agreement, understanding or conspiracy among competitors. Any agreement to fix prices is prohibited, and real estate professionals should never agree, expressly or implicitly, with their competitors about matters such as the commission rate charged to consumers or the cooperative compensation they will offer to cooperating brokers. Similarly, brokers should never agree with other competitors to refuse to deal—or to only deal on certain terms—with another competitor or business. Avoid discussions with competitors about how to do business with other competitors altogether.

Risk Reduction Tips

1. Always make pricing decisions unilaterally and independently
2. Do not discuss your pricing or compensation with other brokers.
3. Do not discuss or agree with competitors to boycott or refuse to deal with another broker or business.
4. Do not discuss or agree with competitors to divide up markets, customers or practice areas. Such market allocation agreements are generally illegal.
5. Implement a written antitrust compliance program and regularly educate salespeople and staff about antitrust laws.
6. Never contribute to anticompetitive discussions - whether in-person or online. If you find yourself in a meeting or conversation where anticompetitive behavior occurs, make your objection clear by leaving the meeting and ask that your objection be recorded in the minutes or document it in a follow-up email.

Resources

- [Window to the Law: Antitrust for Real Estate Professionals](#)
- ["Antitrust 101 for Real Estate Professionals" video](#)
- [Antitrust Pocket Guide](#)
- [MLS Antitrust Compliance Policy](#)

CYBERCRIME and WIRE FRAUD

Cybercrime continues to be a top concern in the real estate industry. In 2023, the FBI Internet Crime Complaint Center (IC3) received a record number of complaints from the American public, a nearly 10% increase over 2022, with potential losses exceeding \$12.5 billion, up 22%. The top scams facing consumers and business in the real estate industry are:

1. **Phishing/vishing/smishing/pharming** whereby fraudsters use unsolicited emails, text messages and phone calls from a purportedly legitimate company to obtain personal, financial and login credentials;
2. **Wire fraud** is carried out by fraudsters compromising email accounts to effectuate fraudulent fund transfers; and
3. **Ransomware** whereby cybercriminals install malicious software that locks users out of their systems or encrypts data making it inaccessible unless a ransom payment is paid.

FinCEN's Financial Trend Analysis report on business email compromise in real estate underscores that real estate continues to be an attractive target for cybercriminals to exploit the high monetary values generally associated with real estate transactions.

According to the report, FinCEN found that 37 percent of fraudulent wire instruction emails impersonate the title/closing entity, and 23 percent of such emails impersonate a real estate professional in the transaction. Real estate professionals should be aware of the risks facing not only their businesses, but also consumers, and educate staff and clients about preventative steps they can take to prevent falling victim to cybercrime.

Risk Reduction Tips

1. Train staff educate to be suspicious before clicking on unknown links or attachments.
2. Routinely patch and update business software and equipment.
3. Distribute [information to consumers](#), remind consumers throughout the transaction about the threat of wire fraud, and always verify any wire or payment instructions with a known contact before sending any money.
4. Use multifactor authentication and require passwords to be updated regularly.
5. Backup data and files regularly, following the 3-2-1 backup strategy; 3 copies of the data in 2 different formats with 1 copy stored off-site.
6. Require vendors to adhere to good cybersecurity practices, and obtain assurances in contracts.
7. Immediately report any suspected cybercrime incident by filing a report at www.ic3.gov, to the local FBI office, and local law enforcement.

Resources

- [Mortgage Closing Scam Client Advisory Brochure](#)
- [Window to the Law: Avoiding Wire Fraud in Transactions](#)
- [Window to the Law: Protecting Your Business from a Ransomware Attack](#)
- [Window to the Law: Cybersecurity: What You Need to Know](#)
- [Cybersecurity Checklist: Best Practices for Real Estate Professionals](#)
- [NAR Data Security & Privacy Toolkit](#)
- [NAR Emerging Technology Series: Episode 3 – Ransomware](#)
- [Drive with NAR: What to Do If Your Business Faces a Ransom Threat](#)
- [AEI Year-Round Virtual Sessions: Cybersecurity Best Practices in the Era of COVID-19](#)
- [Cyber and Fidelity Insurance Report for Real Estate Brokers](#)
- [FinCEN Financial Trend Analysis on Business Email Compromise in the Real Estate Sector](#)
- [FBI Internet Crime Center Internet Crime Report 2023](#)
- [Directory of Local FBI Field Offices](#)

ARTIFICIAL INTELLIGENCE

Generative artificial Intelligence (AI) has become a game-changer for the real estate industry in the past year, offering a wide range of capabilities to improve efficiency and productivity. AI platforms can create listing descriptions, property searches, social media posts, marketing content, and more. However, understanding the risks of using AI is critical to avoid ethical issues and potential legal liability. AI platforms are not 100% accurate and its output may not comply with fair housing laws. REALTORS® remain responsible under Articles 2 and 12 of NAR's Code of Ethics to ensure their representations and communications are honest, truthful and avoid exaggerating, misrepresenting or concealing pertinent facts.

Risk Reduction Tips

1. Always review AI-generated content for accuracy.
2. Protect personal information from being shared with an AI platform. Information provided to a generative AI platform is used to train the AI for future interactions, so personal information you input may not remain private.
3. Do not use AI to create content you wish to copyright, as AI-generated works are not protectable under U.S. Copyright law.
4. Avoid using AI to draft contracts, modify standard forms, or provide legal advice to clients. Instead, seek appropriate advice from actual professionals.

Resources

- [Window to the Law: Legal Tips to Use AI in Your Business](#)
- [Using AI to Enhance Listing Photos Can Be Legally Risky](#)
- [How Generative AI Can Transform Your Real Estate Images](#)
- [Prevent Deepfakes from Hijacking Your Transactions](#)
- [Course: What Is AI and Why Do We Need to Know About It?](#)
- [How AI and VR are Helping to Buy and Sell Homes](#)
- [REALTOR® Magazine: Start Experimenting with AI Now](#)
- [REALTOR® Magazine: What You Can Do That Artificial Intelligence Can't](#)
- [REALTOR® Magazine: AI Use in Real Estate Comes With Copyright Concerns](#)
- [2023 PropTech Forecast: Generative AI](#)

COPYRIGHT INFRINGEMENT

Copyright law affects multiple aspects of the real estate business, and it is easier than ever for copyright owners to discover unauthorized uses of their works. Therefore, it is important for real estate professionals to understand the basics of copyright and how to avoid infringing another person's work. To avoid costly copyright infringement demands, real estate professionals should be sure to obtain permission to use any third-party work, comply with the terms of the license to avoid copyright infringement and keep records to easily confirm rights as needed. Many of the most common activities performed by real estate professionals can create some risk of copyright infringement, including:

1. **Floorplans:** A federal court recently found brokerages' use of independently created floorplans in their listings to be a fair use of copyrighted architectural drawings of a home. The [Designworks](#) decision provides a clear roadmap for brokers facing allegations that their creation or use of floorplans infringes copyrights in underlying home designs and will hopefully deter other home designers from pursuing similar claims.
2. **Photos:** Be sure to confirm that any rights received align with the current and planned use of photographs or other third-party work before using it, including on a website, in the MLS, and marketing materials.
3. **Music:** Real estate professionals should also ensure proper rights to any music used at live events, such as an open house, and before incorporating into recordings. Keep in mind that specific types of licenses must be obtained before incorporating music into a video recording.
4. **Websites:** Real estate professionals should comply with the Digital Millennium Copyright Act safe harbor to reduce the risk when third parties post on their websites, including photos and music that appear through an IDX displays.

Risk Reduction Tips

1. Obtain ownership or a broad exclusive license for photographs.
2. Secure a performing rights license to play music at a live event and a synchronization and master recording license before incorporating music into a video, such as a listing video. Be sure to understand the rights granted in license agreements and consider any future use of copyrighted material when securing the license.
3. Comply with the Digital Millennium Copyright Act safe harbor.
4. Keep records of license agreements to easily confirm rights, if challenged.

Resources

- [Window to the Law: Using Floorplans to Market Listings](#)
- [Window to the Law: Protect Your Website from Copyright Liability](#)
- [Window to the Law: Copyright Best Practices for Listing Photos](#)
- [Window to the Law: Copyright Issues for Real Estate Professionals](#)
- [Window to the Law: How to Avoid Copyright Infringement](#)
- [Listing Photo Sample Agreements](#)
- [NAR Risk Management Webinar Series: Copyright: Best Practices to Avoid Costly Claims](#)

VACANT LAND SCAMS

Vacant land scams have proliferated in recent months. Scammers posing as property owners target lien-free vacant land and unoccupied properties, tricking a real estate professional into listing the property for sale. In a “too good to be true” scenario, the seller asks to list below market value and wants a quick sale, preferably for cash. Communication is by text or email and the seller wants a remote closing, as they’re out of state or the country. These scams defraud innocent buyers and can result in liability for unwary agents. State regulators may take action against a licensee for negligence in failing to exercise due diligence to verify the seller’s identity and ownership interest.

Risk Reduction Tips

1. Look out for [red flags](#) when approached to list a vacant parcel or unoccupied property, such as insisting on a quick sale and all-cash buyers, accepting less than market value, and refusing to meeting in person or by videoconference.
2. Exercise due diligence to verify the purported seller is the actual property owner, which may include sending a certified letter to the owner’s address of record on file with the county recorder.
3. Conduct independent research to confirm the property owner, such as looking online for a recent photo or speaking to a neighbor.
4. Make sure you or the title company select the remote notary at closing.
5. Report a suspected vacant land scam to local law enforcement and file a complaint at [IC3.gov](https://ic3.gov).
6. Remove the listing from the MLS and take down any advertisements quickly.

Resources

- [Window to the Law: Avoiding Vacant Land Scams](#)
- [Vacant Land Scams Red Flags and Recommended Practices](#)
- [Scammers are Plotting to Sell Vacant Land Fraudulently](#)
- [U.S. Secret Service Advisory](#)

FAIR HOUSING

Safety is a priority for real estate professionals, and several apps and websites provide verification of a potential client's credentials before the first meeting. Some of those tools conduct a criminal background check, which is provided to the real estate professional. When using these apps, it’s important to keep fair housing in mind.

We all have implicit biases—our brains use shortcuts to categorize people based on their identity to help us process information quickly. If we treat clients differently based on stereotypes instead of their qualifications, fair housing becomes a concern. Studies show that people have a tendency to find reasonable explanations for the behavior of

the dominant group, while placing blame on members of the non-dominant group. For example, an agent looks up two clients, one White and one Black on a safety app, and each has a conviction for a speeding ticket. Will the agent treat each customer the same? Or will the agent draw different conclusions about why the buyer has a conviction, and treat them differently?

The use of criminal histories to make housing decisions has long been on fair housing advocates' radars. Guidance provided by the Department of Housing and Urban Development (HUD) in 2016 revealed that African Americans and Hispanics are arrested, convicted, and incarcerated at disproportionate rates compared to the general population, resulting in criminal history-based barriers to housing and creating a disproportionate impact on minorities. If an agent refuses to provide services based on a criminal background, the agent must be able to show a legitimate business reason for denying those services. Overly broad criminal policies typically fail to pass legal muster. Criminal background policies must be tailored to the business issue being addressed—here, the agent's safety. Rejecting a prospective client based on a previous violent crime would clearly serve the legitimate interest of protecting the agent's safety. Rejecting a prospective client based on a speeding ticket or an arrest for a misdemeanor is a more difficult case to make.

Risk Reduction Tips

1. Have a written criminal history policy that includes the use of apps to screen clients.
2. Apply criminal record policies consistently.
3. Do not ask about or consider arrests without convictions.
4. Avoid blanket bans on applicants with a criminal conviction.
5. Be sure to exclude only those with convictions that present a demonstrable risk to your safety.
6. Incorporate regular implicit bias and fair housing compliance into your ongoing training plans.

Resources

- [Real Estate Brokerage Essentials Chapter on Fair Housing](#)
- [Article: Criminal History-Based Practices and Policies](#)
- [Video: Implicit Bias Override](#)
- [At Home with Diversity Certification](#)
- [Research Report: A Snapshot of Race and Homebuying in America](#)
- [REALTOR® Fair Housing Declaration](#)
- [Fairhaven: A Fair Housing Simulation](#)
- [Window to the Law: Criminal Background Checks and Fair Housing](#)
- [Window to the Law: Advertising within the Fair Housing Framework](#)
- [Window to the Law: Housing Vouchers and Fair Housing](#)
- [Window to the Law Video: Creating a Diversity, Equity & Inclusion Policy](#)

INDEPENDENT CONTRACTOR STATUS

The ability to work as an independent contractor is recognized and protected under [many state](#) and some federal laws. The risk of misclassification poses a challenge for brokerages, particularly with the proliferation of teams, where team leads may want to dictate how team members manage their tasks and time. While there is often an inherent conflict between common law independent contractor status and the traditional classification of real estate salespeople as independent contractors, some state statutes expressly address the unique status of real estate agents, permitting classification as independent contractors despite the required control and supervision the broker has over the licensees. For example, in 2022, New Jersey amended its real estate brokerage law to retroactively exclude real estate salespersons from the state wage law, which uses the “ABC test” to classify workers. In addition, a [recent California appellate decision](#) affirmed a salesperson’s ability to choose to be an independent contractor, citing a 3-part test found in the state business licensing code.

However, litigation and new federal and state legislation continue to threaten workers’ ability to be classified as independent contractors, including many real estate professionals. On March 11, 2024, a new U.S. Department of Labor (DOL) [rule](#) updated the test for determining whether a worker is an employee or independent contractor under the Fair Labor Standards Act. The new rule shifts the analysis of whether a worker is an employee or an independent contractor to a more complex “totality-of-the-circumstances” standard. The rule is expected to make it harder for workers to be classified as independent contractors, despite the DOL stating that the new rule will not result in widespread changes to worker classification.

Risk Reduction Tips

1. Know your state law regarding independent contractor classification of real estate licensees. Statutes protecting this classification are the strongest defense to a legal challenge.
2. Always have a written independent contractor agreement and consider including a mandatory arbitration and class action waiver provision in such agreements.
3. Don’t mandate meetings, administrative office duties, or use of certain tools.
4. Allow salespeople to work where, when, and how they deem best.

Resources

- [Window to the Law: Independent Contractor Best Practices](#)
- [Window to the Law: Legal Issues for Teams](#)
- [Frequently Asked Question about the Department of Labor's Independent Contractor Rule](#)
- [NAR Issue Brief: Real Estate Professionals' Classification as Independent Contractors](#)
- [Independent Contractor State Law Survey](#)
- [Independent Contractor Status Frequently Asked Questions](#)
- [Key Provisions for Independent Contractor Agreements](#)

TCPA & DNC: TEXTING AND CALLING

Plaintiff lawyers have created a lucrative business model filing class action lawsuits alleging real estate professionals have violated the Telephone Consumer Protection Act (TCPA) and Do Not Call (DNC) laws by sending text messages and placing phone calls without the recipient's consent. Specifically, the TCPA requires prior express written consent before using an automatic telephone dialing system (ATDS) to place telemarketing calls or texts to wireless numbers.

The [United States Supreme Court](#) has narrowly defined the TCPA's ATDS definition to require that the call technology not only store or dial numbers, but actually use a random or sequential number generator to place the calls. Thus, calls using random or sequential number generators still require prior express written consent, which involves a signed agreement clearly and conspicuously disclosing the text recipient's permission to receive call and text messages from the sender. Now it is clear that calls generated individually - not using a random or sequential number generator - need not obtain prior consent at all, even if the device has the ability to store and dial call lists. Keep in mind that DNC laws should always be followed, which prohibits individuals from contacting phone numbers contained in the DNC registry.

In response to the U.S. Supreme Court's decision, several states have enacted so-called "mini-TCPA" laws which change the ATDS definition and provide additional restrictions on telemarketing calls and texts. In some states, the requirement for express written consent has been expanded to include any calls made using an automated dialing device or artificial voice message, not just random or sequential numbers. States have also adopted additional restrictions on the times in which such calls can be made as well as specifying the content and timing of required disclosures during a telemarketing call. These mini-TCPA laws apply to calls made within and to consumers located within the applicable states, and could provide the setting for the next wave of litigation on this issue as state courts tend to be more consumer-friendly.

Risk Reduction Tips: TCPA

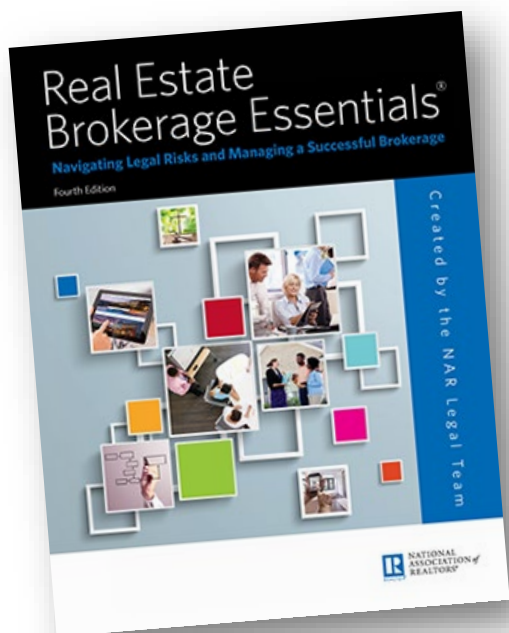
1. Consent is the gold standard to avoid TCPA liability and must be obtained when using technology that employs a random or sequential number generator. Consent should be clearly stated, well documented and preserved.
2. Include language on consent forms stating that recipients who submit wireless numbers agree to receive calls and text messages from or on behalf of the sender.
3. Allow recipients to easily cancel or opt-out (e.g., by responding "STOP" or "UNSUBSCRIBE"). Promptly remove individuals from messaging lists who have opted out. Maintain an opt-out record, including the date the person opted-out and the date the person was removed.
4. Talk to your vendors about TCPA and DNC compliance and indemnification.
5. Consult counsel regarding the applicability and requirements of any applicable "mini-TCPA" laws.

Risk Reduction Tips: DNC

1. [Create an office policy](#) for compliance with DNC rules, and implement a method to monitor compliance.
2. [Obtain an updated DNC list monthly](#) and cross reference with your company customer relationship management platform.
3. Obtain prior express written consent directly from consumers you intend to call or text for marketing purposes.
4. Know your state laws and whether it has adopted a “mini-TCPA” law.
5. Review the terms of service with any vendors you use to obtain phone numbers or automate calls and texts and ask that the vendor warrant its compliance with the TCPA and indemnify you from TCPA and Do-Not-Call Registry liability.
6. Weigh the return on investment before incorporating ATDSs and artificial voice messages into your marketing practices to be sure the benefit outweighs any risk of TCPA liability.

Resources

- [Window to the Law: Updated Guidance on TCPA Compliance](#)
- [Window to the Law: Comply with The Do Not Call Registry](#)
- [Window to the Law: TCPA and Texting](#)
- [Window to the Law: TCPA Update on Cell Phone Marketing](#)
- [TCPA Quick Reference Guide](#)
- [DNC Safe Harbor Provision](#)
- [REALTOR® Magazine: “Do You Know Who You Are Calling?”](#)
- [National Do Not Call Registry](#)



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