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NAR's \$418M Settlement: The End of Real Estate Commissions as We Know It?



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Aaron practices in the areas of Real Estate Finance, Real Estate, and Business Law. He has experience with general real estate and commercial real estate finance transactions.

The National Association of Realtors (“NAR”) recently reached a settlement that has the potential to transform the real estate industry and its traditional commission structure.

Background

NAR agreed to a \$418 million settlement in response to antitrust lawsuits. The allegations centered around NAR’s commission structure, which has been uniformly set across the industry at 6% commission, divided between the seller’s agent and the buyer’s agent.

Impact on Commission Rates

One of the most significant changes resulting from the settlement is the removal of compensation offers via the Multiple Listing Service (“MLS”). Brokers advertising on the MLS are no longer required to offer upfront compensation to a buyer’s agent. In addition, agents cannot be required to join the MLS to transact or receive payment.

- **Pre-Settlement:** NAR rules required seller’s agents, who listed a home on the MLS, to make a “blanket unilateral offer of compensation” to the buyer’s agent — meaning the compensation terms must be the same for *all* buyer agents regardless of experience level, services provided, and negotiations between the buyer and agent. The rules left essentially no room for flexibility.
- **Post-Settlement:** Offers of compensation can no longer be listed through the MLS, which means buyer agents will need to negotiate compensation outside of the MLS system. Types of compensation may include: a fixed-fee commission paid directly by the client, seller concessions, or a portion of the listing broker’s compensation.

As many across the industry have speculated, the NAR settlement could signal the end of the standard 6% commission rate.

At a minimum, the settlement creates a path for increased flexibility and lower commission rates.

Industry Reactions

Industry response to the NAR settlement has been mixed. Some view it as a necessary evolution and the end of what many perceive as NAR’s excessive control over the industry. When the U.S. is compared to similarly situated countries, the 6% standard commission rate is relatively high:

- In the United Kingdom, Ireland, and Australia consumers typically pay about 2%.
- Germany averages 4.5%.
- France’s average commission is around 5%.

However, others have expressed concern about what the settlement means for first-time homebuyers and the overall housing market. For instance, if a seller is no longer required to pay a buyer’s agent, a buyer with little to no experience in the real estate industry may decide to forgo representation altogether. Self-represented buyers may lack knowledge about the intricacies of purchase agreement negotiations and struggle to navigate the buying process.

Notably, the NAR settlement primarily focused on residential real estate transactions. It does not directly apply to commercial properties. However, the residential and commercial real estate industries are interconnected, and changes in regulations or practices in one area may have indirect effects across various property types.

Conclusion

The NAR settlement is a significant development that could lead to the end of the standard 6% commission rate in the U.S. The settlement encourages more transparent and competitive commission practices, which could benefit both buyers and sellers long-term. With the new rules taking effect in July 2024, the full impact of the settlement will likely take some time to unfold.



When Divorce Law Does Not Apply:

Unjust Enrichment Claims for Unmarried Parties



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April is a member of Moss & Barnett's Family Law team. She assists clients in all family law matters, including divorce and custody proceedings, and preparation of cohabitation agreements.

Family structures continue to evolve. It is now common for unmarried couples to cohabit and join their finances. These relationships often resemble a traditional marital partnership. However, when these relationships end, the same legal protections afforded to divorcing married couples are not afforded to unmarried couples wishing to separate.

Family law attorneys must find creative legal theories to achieve a fair financial separation for unmarried but financially intertwined couples. As discussed below, the Minnesota Supreme Court recently addressed this issue in *Herlache v. Rucks*, 990 N.W.2d 443 (Minn. 2023).

Facts

Herlache and Rucks met in February 2012 and began dating soon after. At the time, Rusk owned a home in Sunfish Lake. She purchased the home in February 2010 with the intention of renovating it.

Herlache moved into the Sunfish Lake home in October 2012 and began paying Rucks \$1,000 per month for rent. Over the course of their relationship, Herlache made \$282,736.02 in cash payments directly to or on behalf of Rucks to renovate the home.

However, when the pair ended their relationship in December 2018, Rucks sold the home for \$1.2 million. She did not share the proceeds with Herlache, who then sued Rucks for the money he contributed to renovate the home.

Procedural History

The district court concluded that Rucks would be unjustly enriched if she retained the benefit of Herlache's financial contributions and awarded Herlache \$282,736.02 in damages — the exact amount he financially contributed.

In a split decision, the Minnesota Court of Appeals reversed the district court. The Court held that Herlache could not recover

on his unjust enrichment claim because the claim involved "investments in real estate." The Court held that Herlache needed to prove his financial contributions resulted in the increase in value to the Sunfish Lake home.

Herlache appealed the decision to the Minnesota Supreme Court.

The Minnesota Supreme Court's Decision

The Minnesota Supreme Court began its analysis by distinguishing the facts of *Herlache* from the case law relied upon by the Court of Appeals — specifically, *Marking v. Marking*, 366 N.W.2d 386 (Minn. Appl. 1985). In *Marking*, the plaintiffs made improvements directly to the property, and the defendants received no direct payments of cash. The plaintiffs failed to show that their physical labor and improvements increased the value of the real property. As a result, their unjust enrichment claim failed.

The Minnesota Supreme Court concluded that the facts of *Marking* were materially different from the facts of *Herlache*. Unlike the plaintiffs in *Marking*, Herlache made direct cash payments to and on behalf of Rucks. Every dollar Herlache contributed to the renovations was a dollar that Rucks did not have to contribute.

According to the Court, the direct cash payments to and on behalf of Rucks resembled a classic unjust enrichment case. While measuring the increase in value of the Sunfish Lake home was *one way* of measuring the benefit Rucks received, the Court held that the district court was within its broad discretion to measure the benefit by the actual cash payments Rucks received.

Conclusion

The *Herlache* case underscores the importance of having an attorney evaluate the unique facts of your case for potential claims. For unmarried couples who fall outside of the divorce legal framework, there may be alternate equitable theories to pursue a claim or preventive measures to take to protect one's financial interests. For instance, had the parties in *Herlache* entered into a cohabitation agreement prior to moving in together, they may have avoided litigation at the time of their separation. For additional information on cohabitation agreements and related issues, please contact your Moss & Barnett family law attorney.

Team News

Brian T. Grogan Re-elected and Brian J. Schoenborn Elected to Moss & Barnett Board of Directors

Moss & Barnett is pleased to announce that **Brian T. Grogan** was re-elected and **Brian J. Schoenborn** was elected to three-year terms as members of the firm's Board of Directors, effective January 1, 2024.

Brian T. Grogan serves as the firm's President and Chief Executive Officer and is a member of the firm's Business Law and Communications teams. He provides counsel on regulatory compliance and transactional opportunities to municipal entities across the nation, established companies, new businesses, and trade associations in their complex contract negotiations and regulatory proceedings.



Brian T. Grogan

Brian J. Schoenborn serves as a Director and Chair of the firm's St. Cloud office. He is a member of the firm's Business Law, Estate



Brian J. Schoenborn

Planning and Wealth Preservation, Mergers and Acquisitions, Closely Held Businesses, Securities, Financial Services, Real Estate, and Technology teams. Brian provides strategic counsel to private businesses and families with an eye toward preventing problems, contributing vision and creative leadership, and capitalizing on relationships and opportunities. He is a comprehensive business lawyer who serves as outside general counsel for many of his clients, focusing on the intersection of business law, business succession, and estate planning.

Brian Grogan and Brian Schoenborn will each continue practicing law on a full-time basis in addition to handling their management responsibilities. They are joined on the Board by Co-Directors, **John P. Boyle**, **Jana Aune Deach**, **Timothy L. Gustin**, and **Christopher D. Stall**.

Aylix K. Jensen Elected a Shareholder of Moss & Barnett



Aylix K. Jensen

Moss & Barnett is pleased to announce that **Aylix K. Jensen** has been elected a shareholder of the firm effective January 1, 2024.

Aylix focuses her practice on defending creditors, fintech companies, collection agencies, and debt buyers in consumer litigation and regulatory matters at both federal and state levels. She has substantial experience defending clients against claims brought under the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA), the Telephone Consumer Protection Act (TCPA), and other consumer protection laws and regulations. She also offers strategic guidance regarding compliance and risk management. Aylix received her J.D. from the University of Minnesota Law School and her B.A. from the University of Minnesota Twin Cities.

Lynn M. Mattson Joins Moss & Barnett as New Executive Director



Lynn M. Mattson

Moss & Barnett is pleased to announce that **Lynn M. Mattson** has joined the firm as its new Executive Director. Lynn is responsible for the firm's administrative functions including Finance, Human Resources, IT, and Facilities. She brings more than 25 years of law firm finance and operations management experience to her role. Prior to joining Moss & Barnett, Lynn served in senior finance and operating positions at two other Twin Cities law firms. She received her M.B.A. in Venture Management from the University of St. Thomas and her B.A. in Finance from the University of St. Catherine.

"Lynn will bring a wealth of law firm management experience, broad financial expertise, and exceptional interpersonal skills that will serve us well."

- Brian Grogan, President and CEO of Moss & Barnett

Three New Lawyers Join Our Team

Ryan is in a unique position to assist clients in dealing with the ongoing transitions in the energy and communications sectors having served as General Counsel to the Minnesota Public Utilities Commission and Assistant Attorney General in the Office of the Minnesota Attorney General, Residential Utilities and Antitrust Division, before joining the firm. Building on more than a decade of public service, including responsibility for providing advice on all aspects of legal management, strategy, and regulatory matters, he has a deep understanding of how utilities operate in the regulatory system and how to achieve positive outcomes that satisfy both clients and regulators. Ryan also has experience in administrative law and contested case proceedings, working with state agencies, drafting and reviewing legislation, handling high stakes appellate matters and environmental review requirements under state and federal law, and in advising clients on matters related to data practices and Open Meeting laws. He received his J.D., *magna cum laude*, from the University of Minnesota Law School, where he served as managing editor of the *Minnesota Law Review*. After receiving his J.D., Ryan clerked for the Honorable Kathleen D. Sheehy, Minnesota District Court, Fourth Judicial District, for two years. He received his B.A. in Economics and Political Science from the University of Wisconsin-Madison.

Ryan P. Barlow

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Energy and Public Utilities
Communications



Austin represents clients on a wide variety of litigation matters, including contract disputes, shareholder disputes, real estate disputes, and inheritance litigation. Prior to joining Moss & Barnett, he took on a wide variety of litigation matters at a full-service law firm in Milwaukee, Wisconsin. Austin has his Sports Law Certification from the National Sports Law Institute, and he is listed as a Rising Star in *Wisconsin Super Lawyers*. While in law school, Austin clerked for a federal district court judge in the Eastern District of Wisconsin. He received his J.D., *magna cum laude*, from Marquette University Law School where he served as articles editor for the *Marquette Law Review* and executive editor for the *Marquette Sports Review*; and his B.S., *summa cum laude*, in Criminal Justice from the University of Wisconsin Milwaukee.

Austin J. Malinowski

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Litigation



Issa returns to the firm after serving as General Counsel for ACA International, a trade association for the accounts receivable management industry. He focuses his practice on representing clients in litigation and providing counsel to clients on compliance, risk management, and general business matters. Issa regularly advises clients on compliance with consumer financial laws and regulations, including the Fair Debt Collection Practices Act (FDCPA), Fair Credit Reporting Act (FCRA), and Telephone Consumer Protection Act (TCPA). He also represents clients in class action litigation and regulatory actions brought under those and similar financial laws and regulations. Issa has extensive in-house legal experience as both General Counsel and Chief Compliance Officer for companies. In those roles, he built compliance management systems, managed client and regulator audits, examinations, and other proceedings, and handled a wide variety of business and corporate legal matters. Issa also has extensive experience representing debtors, creditors, trustees, and other parties in bankruptcy matters, including preference and fraudulent transfer actions. Issa received his J.D., *cum laude*, from the University of Pennsylvania Carey Law School and his B.A. from the University of Virginia.

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Financial Services
Litigation



Select Bids Fairly, or Bid Farewell



Jeffrey A. Wieland

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Jeff practices in Construction Law and Litigation. Licensed in state and federal court in Minnesota and North Dakota, he represents contractors, subcontractors, suppliers, and owners.



Madeline E. Davis

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Madeline practices in Construction Law and Litigation. She represents contractors, subcontractors, and insurers in residential and commercial projects, in both the public and private construction sectors.

Anytime a road is renovated, a public school is built, or a city storage shed is constructed, that construction project likely began through a process called competitive bidding. Despite its frequent use, the requirements and intricacies of competitive bidding can be a surprise to project owners and contractors alike.

What is Competitive Bidding?

The Purpose.

Minnesota competitive bidding laws were enacted by the legislature to ensure that all contractors have an equal opportunity to bid on projects and to ensure that the taxpayers are getting the best bargain possible. Minnesota courts require rigid adherence to the requirements of public bidding to ensure that public entities act transparently and economically. To achieve those purposes, public officials must follow their own designated procedures and have limited discretion in selecting bidders outside of the low, responsible bidder. If a public entity rejects a low bid, that decision must be based upon a substantial reason.

The Bidding Process.

Public entities must use competitive bidding for projects with an estimated price of over \$175,000.00. Competitive bidding applies to construction, alteration, repair, and maintenance of real or personal property as well as for the sale or rental of supplies, materials, and equipment.

To begin the process, a public entity issues a solicitation with instructions for bidders. The instructions may be amended by

addenda. It is important to analyze every addendum issued, as the addenda typically amend the bid requirements. On or before the bid due date included in the instructions, bidders submit a "sealed" bid, frequently through an online portal.

Then, the public entity will read and tabulate the bids aloud. All bidders are able to, and should, watch (online or in person) as bids are read. Minnesota competitive bidding law requires the public entity to award the project to the lowest, responsible, responsive bidder. The lowest responsive bidder must be determined immediately at bid opening.

Responsive and Responsible Bidders.

A responsive bid is one that conforms substantially to the advertised plans and specifications issued by the public entity. A bid may be considered non-responsive if it fails to, for example, acknowledge all addenda or include required companies that qualify as a part of the Disadvantaged Business Enterprise Program. A bid that is not responsive cannot be awarded the project.

A responsible bidder is one who is financially able and competent to complete the work. The specific requirements to be a "responsible" bidder include compliance with various state and federal requirements, including tax, workers' compensation, wage, and safety requirements. Public entities also require bidders to submit a bid bond to verify the bidders' financial qualifications and abilities.

Bid Protests and Consequences for Public Entities.

A bidder or a taxpayer may bring a bid protest action against the public entity that is the owner of the project in various instances. The two most common instances are:

- (1) by the low bidder that was not awarded the project because the public entity deemed the bidder to not be responsible or responsive; or
- (2) by another bidder when the selected bidder's bid was not responsive to the solicitation.

"Bid Farewell" Continued on Page 7

Should a contractor desire to protest a bid, time is of the essence. The contractor or contractor's counsel should, as soon as possible, put the public entity on notice that its bid process and award of contract is not legal under Minnesota competitive bidding law. At this stage, the public entity may re-bid the project or award the project to the low, responsive, responsible bidder. The contractor cannot start a lawsuit challenging the award until it has exhausted its administrative remedies.

Bid Protest Lawsuit.

The public entity may decide to move forward with the bidder it selected, even if that bid was not responsive or the bidder is not responsible. If this is the case, the contractor may continue to protest the bid and contract award through legal action with a summons and complaint and motion for temporary restraining order.

Temporary Restraining Order.

In a motion for a temporary restraining order, the court will consider:

- (a) the harm to be suffered by the contractor if the order is denied, compared with the harm to the public entity if the order is granted;
- (b) the contractor's likelihood of success on the merits;
- (c) public policy considerations;
- (d) the nature and history of the parties' relationship; and
- (e) any administrative burdens to enforce the order.

Put plainly, the contractor must show that it is likely that the public entity violated Minnesota competitive bidding law, the public entity's actions will harm the contractor and the public, and the violation of Minnesota law will frustrate the legal process. The purpose of a temporary restraining order is for the court to maintain the status quo and prevent any further wrongdoing while the legal system resolves the dispute.

Permanent Injunction.

After the temporary restraining order is granted, the contractor then will move the court for a motion for a permanent injunction. Through a permanent injunction, the court is able to label the public entity's actions illegal and require the public entity to begin the bidding process again or abandon the project. The contractor can only recover its bid preparation costs. The contractor may not recover any damages, aside from the bid preparation costs, through a permanent injunction order.

Violation of the Court's Orders.

Should the court order the public entity to stop work and the public entity does not, the contractor may bring a motion asking the court to find the public entity in contempt.

Recently, a public entity ignored a Minnesota court's order that it stop work on its public project and stop payments to the bidder to which it illegally awarded the contract. The public entity did not stop work and, as a result, the trial court held the public entity in contempt of court, advising the public entity that it would be sanctioned. The public entity appealed the trial court's permanent injunction order before the trial court could issue sanctions. The ruling from the Court of Appeals will be helpful as no public entity has been sanctioned for violating a permanent injunction related to Minnesota competitive bidding. This is an evolving area of the law.

Moss & Barnett's Construction Law Team's Competitive Bidding Experience.

The Construction Law team at Moss & Barnett is experienced in quickly putting together bid protest letters, complaints alleging public entities violated Minnesota competitive bidding laws, motions for temporary restraining orders, and motions for permanent injunctions. The Construction Law team has argued dozens of motions for temporary restraining orders and motions for permanent injunctions stemming from competitive bidding violations.

If you believe your bid was low, responsive, and responsible and you should have been issued a public project, contact the Construction Law team at Moss & Barnett for immediate assistance.

We're Proud to Recognize

For over 125 years, our lawyers, paralegals, and professional staff have demonstrated dedication and tenacity in serving the needs of our clients. As we look to the future, our dedication strengthens, as does our appreciation for our clients and our community. Quality legal service is our profession, our business, and our privilege.



Qualified Neutral Under Rule 114 of the Minnesota General Rules of Practice | 2024

Craig A. Brandt

Lawyer

Named by the Minnesota Judicial Branch ADR Program



The POWER 30: Construction and Real Estate Law | 2024

Aaron A. Dean

Lawyer

Awarded by *Minnesota Lawyer*



Finalist, Real Estate Lawyer of the Year-Male | 2024

Timothy L. Gustin

Lawyer

Awarded by *Minnesota Real Estate Journal*



Legal Advisory Board Member | 2024

Aylix K. Jensen

Lawyer

Appointed by The Consumer Relations Consortium



Legal Advisory Board Member | 2024

Issa K. Moe

Lawyer

Appointed by The Consumer Relations Consortium

Alerts

1 ▶ Inquiries into Pay History Prohibited

Beginning January 1, 2024, employers, employment agencies, and labor organizations are prohibited from inquiring into, considering, or requiring the disclosure of the pay history of an applicant for employment for the purpose of determining wages, salary, earnings, benefits, or other compensation for that applicant. The general prohibition against inquiring into the pay history of an applicant does not apply if the job applicant's pay history is a matter of public record under federal or state law, unless the employer, employment agency, or labor organization sought access to those public records with the intent of obtaining pay history of the applicant for the purpose of determining wages, salary, earnings, benefits, or other compensation for that applicant.

The new rule does not prevent an applicant from disclosing pay history for the purposes of negotiating wages, salary, benefits, or other compensation. Such disclosure must be voluntary and without asking, encouraging, or prompting. If an applicant for employment voluntarily and without asking, encouraging, or prompting discloses pay history to a prospective employer, employment agency, or labor organization, nothing will prohibit the employer, employment agency, or labor organization from considering or acting on that voluntarily disclosed salary history information to support a wage or salary higher than initially offered by the employer, employment agency, or labor organization.

See Minn. Stat. 363A.08, subd. 8(b) and (c).

If you would like assistance assuring best practices in this area, please contact your attorney at Moss & Barnett.

Moss & Barnett Ranked by *Best Law Firms*® in 2024



Moss & Barnett is pleased to announce that it has been recognized in the 2024 edition of *Best Law Firms*®, ranked by *Best Lawyers*®, nationally in two practice areas and regionally in 17 practice areas. This is the 14th consecutive year the firm has been ranked in *Best Law Firms* (formerly *U.S. News – Best Lawyers*®).

Firms included in the 2024 *Best Law Firms* list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking in *Best Law Firms* on a national and/or metropolitan scale signals a unique credibility within the industry. The transparent, collaborative research process employs qualitative and quantitative data from peer and client reviews that is supported by proprietary algorithmic technology to produce a tiered system of industry-led rankings of the top four percent of the industry. Receiving a tier designation represents an elite status, integrity, and reputation that law firms earn among other leading firms and lawyers.

"Thank you to our many clients who participated in the *Best Law Firms* evaluation process on our behalf. We are grateful for your trust in us."

- Brian Grogan, President and CEO of Moss & Barnett

Moss & Barnett Congratulates Our Lawyers Selected for Inclusion in *The Best Lawyers in America* and *Best Lawyers: Ones to Watch for 2024*

Moss & Barnett would like to congratulate the following lawyers named to the 2024 *Best Lawyers* publications:

The Best Lawyers in America



Cindy J. Ackerman
Trusts and Estates



Yuri B. Berndt
Litigation and Controversy-Tax, Tax Law, and Trusts and Estates



Kevin M. Busch
Banking and Finance Law, Financial Services Regulation Law, Litigation-Banking and Finance, and Securitization and Structured Finance Law



Jana Aune Deach
Family Law



Timothy L. Gustin
Real Estate Law



David S. Johnson
Real Estate Law



Jodi L. Johnson
Real Estate Law



Richard J. Johnson
Administrative/Regulatory Law and Energy Law



Richard J. Kelber
Corporate Law and Mergers and Acquisitions Law



Mary Frances Price
Elder Law and Trusts and Estates



Joseph G. Socha
Trusts and Estates



Christopher D. Stall
Business Organizations (including LLCs and Partnerships) and Corporate Law



Bryant D. Tchida
Commercial Litigation



James J. Vedder
Family Law

Best Lawyers: Ones to Watch in America



Kelly C. Engebretson
Commercial Litigation and Construction Law



Aylix K. Jensen
Financial Services Regulation Law



Brittney M. Jones
Family Law



Peter J. Kaiser
Business Organizations (including LLCs and Partnerships) and Mergers and Acquisitions Law



Susan A. King
Trusts and Estates



John M. Schmid
Real Estate Law



Alex R. Schoephoerster
Business Organizations (including LLCs and Partnerships), Closely Held Companies and Family Business Law, Corporate Law, and Mergers and Acquisitions Law



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