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Real Estate Cases To Watch In The Second Half Of 2019

By **Andrew McIntyre**

Law360 (July 8, 2019, 4:18 PM EDT) -- A massive class action concerning broker fees and a Zillow trade secrets suit are among the cases real estate lawyers will be watching in the second half of 2019.

A Chicago class action could fundamentally change the way residential brokers across the country get paid, while Zillow Inc.'s suit against Urban Compass Inc. calls into question what exactly real estate tech trade secrets look like. And lawyers also say the second half of the year could see more retail bankruptcies.

Here, Law360 looks at what real estate lawyers are watching in the second half of 2019 — a pair of current cases and two retailers that may initiate bankruptcy proceedings.

Broker Class Action

A suit filed earlier this year in Chicago takes aim at the nation's largest listing services, with the plaintiff arguing that the companies have violated federal antitrust laws by requiring home sellers to pay "inflated" commissions to both buy- and sell-side brokers. The suit could have a nationwide impact, lawyers say.

"This action takes direct aim at the ethical burden imposed on a seller to pay the commission for a buyer's representative working against the seller's interests," said Andrew Raines of Raines Feldman LLP. "This method of payment appears noncompetitive and will now be tested."

The suit, brought by a recent home seller, challenges the National Association of Realtors' 1996 Buyer Broker Commission Rule that requires the seller to pay both commissions, which is often a total of roughly 6%. The suit cites lower commissions in other countries and notes that buyer brokers often have less of a role now than they once did, since many buyers now locate potential properties on their own thanks to the internet.

Jason Kellogg of Levine Kellogg Lehman Schneider & Grossman LLP said the breadth of the lawsuit is notable, since the outcome of the case could affect the way brokers across the country do business.

The plaintiff is represented by William Anderson and George Farah of Handley Farah & Anderson PLLC; Steve Berman, Elizabeth Fegan, Daniel Kurowski, Rio Pierce and Whitney Siehl of Hagens Berman Sobol Shapiro LLP; Matthew Berry, Beatrice Franklin, Marc Seltzer and Steven Sklaver of Susman Godfrey LLP; Robert Braun, Benjamin Brown, Alison Deich, Carol Gilden, Kit Pierson and Daniel Small of Cohen Milstein Sellers & Toll PLLC; Benjamin Elga and Brian Shearer of Justice Catalyst; and Marisa Katz and Vildan Teske of Teske Katz Kitzer & Rochel PLLP.

HomeServices of America Inc. is represented by Matthew Barr, Matthew Ciulla, Karoline Jackson, Denise Lazar and Robert MacGill of Barnes & Thornburg LLP and by Jennifer Keas, Erik Kennelly and Jay Varon of Foley & Lardner LLP.

The National Association of Realtors is represented by Jack Bierig, Adam Diederich and Robert Wierenga of Schiff Hardin LLP.

Keller Williams Realty Inc. is represented by Martin Durkin, William Farley, Anna Hayes, David Kully and Timothy Ray of Holland & Knight LLP.

Re/Max Holdings Inc. is represented by Odeshoo Hasdoo, Paula Render and Erin Shencopp of Jones Day.

Realogy Holdings Corp. is represented by Kenneth Kliebard and Stacey Mahoney of Morgan Lewis & Bockius LLP.

The case is *Moehrl v National Association Realtors*, case number 1:2019cv01610, in Illinois Northern District Court.

Zillow Trade Secrets Dispute

Online real estate listings provider Zillow in April filed a suit alleging Urban Compass, one of Zillow's competitors, "incited" one of Zillow's engineers to leave the company for Urban Compass and alleges trade secret misappropriation and breach of contract on the part of the company. The suit is putting focus on just what sorts of tech trade secrets companies like Zillow have, and how they're protected.

"Zillow defines as its trade secrets ... machine learning processes and technology. What is it about those that makes them so protectable?" said Dusty Hecker of Arent Fox LLP. "They need to indicate what the trade secrets are in sufficient detail. ... Why are they trade secrets?"

That question, as it will play out in court, is tricky because the heart of the case rests on trade secrets, yet Zillow is not about to disclose its trade secrets in the complaint or even later in the case, Hecker notes.

"Plaintiffs won't put into the complaint the information that they want to protect," Hecker said. "Once it's in the complaint, it's no longer confidential."

Hecker said he expects the case eventually to settle.

Zillow is represented by Mark Filipini and Pam Jacobson of K&L Gates LLP.

Counsel information for Urban Compass was not immediately available.

The case is *Zillow Inc. v. Urban Compass Inc. et al*, case number 2:19-cv-00592-TSZ, in Washington Western District Court.

Potential Retail Bankruptcy Cases

The last two years have seen a wave of retail bankruptcies as e-commerce has taken more and more business away from brick-and-mortar stores, and lawyers expect that trend to continue in the second half of 2019.

Craig Ganz at Ballard Spahr LLP said he's particularly watching furniture retailer Pier 1 Imports Inc. and restaurant chain Perkins & Marie Callender's Inc., and said both could end up in bankruptcy court later this year.

In the case of Pier 1, a combination of ballooning debt and falling credit ratings as well as the hiring of AlixPartners, which specializes in helping companies restructure, are signs that the retailer may be headed for a bankruptcy filing, according to Ganz.

"All of these ... indicate that a bankruptcy is coming down the pike," Ganz said.

Marie Callender's, though, could go to bankruptcy court for different reasons.

Traffic is up at its restaurants, yet management is looking to sell the company. A sale would likely involve a bankruptcy filing, since would-be buyers likely wouldn't want to take on certain debt and other liabilities with the brick-and-mortar retailer, Ganz said.

"In all likelihood, any sale will have to ... go through bankruptcy court. Any buyer will want to purchase ... free of all liens and any other encumbrances," Ganz said. "It's interesting that despite this, and despite the likelihood of a bankruptcy being filed, traffic is up."

--Editing by Alanna Weissman.

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