

By Deborah H. Long ©2024

Debbie The Teacher

## Introduction

Why is there this “unease” about discussing broker professional fees? Most recently, this issues about compensation have generated a lot of buzz because of the March 2024 National Association of Realtor (NAR) proposed settlement costing the world’s largest trade organization \$418 million as well as costing various large brokerage firm another proposed \$250 million more.

Not only has the proposed settlement generated a lot of buzz among brokers, it has also generated a lot of consumer misinformation.

The lawsuit claimed that NAR and several of the nation's largest residential real estate brokerage companies adopted illegal rules requiring home sellers to pay buyer broker fees – at an inflated rate – in addition to their own brokers’ commissions.

The lawsuit is part of a long history of litigation against brokerage firms and other real estate organizations.

In this course, we will review that history, including a discussion of federal anti-trust legislation as well as North Carolina Real Estate Commission rules regarding compensation and agency agreements.

## HISTORY

Real estate brokers should understand the long history—a 100-year-war, if you will, of sparring between the Department of Justice (DOJ), the Federal Trade Commission, and the NAR. It’s also helpful to understand the *Sherman-Clayton Anti-Trust Act* of 1890.

### Sherman-Clayton Anti-Trust Acts

Is there a standard commission rate? The simple answer is “no.”

The reason there is no standard commission rate in the U.S. is that anti-trust laws (see later discussion) make it unlawful to suggest that there is a set price for brokerage services. Brokerage commission rates are negotiable by the firm and the client based on what the market will bear and what the client is willing to pay.

Why isn't there a standard commission rate? Simple. Because of federal antitrust laws.

In 1890, Congress passed the first antitrust law, which is known as the Sherman Act. The Federal Trade Commission explains the Sherman Act is a "...comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."

In 1914, Congress then passed the Federal Trade Commission Act, which created the FTC, and the Clayton Act. These three laws are still in effect today and are the main antitrust laws in the nation.

States also have their own versions of the antitrust laws that are similar to the federal laws. The FTC states that "...for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up." The courts will apply the laws and determine what constitutes illegal anticompetitive and antitrust behavior.

### **The Sherman Act**

Section 1 of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." Early on this provision was fairly broad and could encompass most behavior engaged in by businesses or individuals. The FTC further explains that the Sherman Act also makes illegal, behavior that amounts to "...monopolization, attempted monopolization, or conspiracy or combination to monopolize."

The Supreme Court has explained that "the purpose of the Sherman Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." Therefore, it is important to understand that not all behavior that may restrain competition is violative of the antitrust laws.

### **The Clayton Antitrust Act**

The Clayton Antitrust Act strengthens earlier antitrust legislation and prohibits anticompetitive mergers, predatory and discriminatory pricing, and other forms of unethical corporate behavior.

The Clayton Antitrust Act also protects individuals by allowing lawsuits against companies and upholding the rights of labor to organize and protest peacefully.

See the following timeline to understand the chronology of events and litigation from 1847 to 2012 as the real estate industry evolved.

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#### **1847**

Brokers begin hosting informal meetings (the first one was in New York) to exchange information about properties for sale and establish standards of practice, typically held once a week. Throughout the 19th century, lawyers and businessmen served as the principal drivers of housing transactions.

#### **1887**

The first realty board is established in San Diego.

## **1905**

The first state association was formed in California; called the California State Realty Federation, it was composed of approximately 70 agents.

## **1917**

California's association convinces the state to pass the first state licensing laws; though it was overturned by the state's courts on constitutional grounds, a modified version was eventually passed in 1919.

## **1923**

The first Association of State Real Estate Commissioners is formed, working closely with National Association of Real Estate Boards (NAREB), NAR's predecessor, to help coordinate state Realtor activities; by 1949, 36 states had adopted license laws, most of them based on California's original law.

## **1939**

NAREB forms the Uniform Commission Committee, which begins a campaign to standardize commission rates across the country; though commissions were fairly uniform in large urban areas, they varied in smaller, local markets, but by 1950, the 5 % commission rate was an industry standard, and calls for 6 percent soon followed.

## **1974-1977**

In a landmark case, *United States v. Foley*, the president Jack Foley Realty, Inc., hosted a dinner party at the Congressional Country Club in Bethesda, Maryland. The guests were nine of the leading realtors in Montgomery County. Following the meal, Jack Foley rose and, after making some other remarks, announced that his firm was raising its commission rate from 6% to 7%. A discussion about the rate change ensued. Within the following months each of the corporate defendants substantially adopted a seven percent commission rate.

A United States grand jury for the district of Maryland indicted the nine defendants in 1977. All defendants were found guilty.

## **1983 (and in 2007)**

The FTC releases the Butters Report and another critical investigation into the real estate industry.

## **1994**

Property listings first become publicly available on the Internet.

## **1995**

Plaintiffs alleged Edina Realty failed to adequately disclose the consequence of dual agency to consumers, including that buyers could become privy to confidential information passed on by the seller's agents. 20,000 Minneapolis/St. Paul home buyers and sellers shared in settlements worth a combined \$19.9 million. State after state passed laws either

forbidding dual agency or allowing it with written consent. It impelled the development of buyer agency, but **it didn't** deal with compensation.

## **2006**

Zillow launches valuation data on millions of homes across the country. Shortly after, it begins allowing agents and consumers to post their own listings. Also in this year, Redfin launches its first brokerage.

## **2012**

Koenig & Strey, a Chicago-area brokerage firm, announces its buyer agreement fee system, which stirs controversy, although other brokerages have been using this process for years.

### **The Foley and Edina Cases**

As outlined above, in 1974, John Foley, the president of a Bethesda, Maryland brokerage firm hosted a party where guests were nine of the leading brokers in that community. Following the meal, Foley allegedly stood up and announced that his firm was raising its commission rate from 6% to 7%. Attendees then discussed the rate change, and over time the brokers adopted a 7% commission rate. A United States grand jury indicted the brokers in 1977. A jury trial found the defendants guilty of criminal price fixing — a felony.

While not all behavior that may be anticompetitive is illegal, there is behavior that is recognized to be a “per se” violation of the antitrust laws. The Supreme Court over the years developed certain guidelines and indicated that certain forms of eliminating competition are unreasonable “per se” or “on its face.” Some actions that are considered to be “per se” illegal include price fixing, group boycotts, market or customer allocations and tying agreements.

Any agreement to fix or suggest commission rates, for example, constitutes a violation of the Sherman Act. Any group of two or more brokers who agree that they will not do business with another broker or particular enterprise would constitute a group boycott. Agreements that restrict the right of competitors to enter a particular territory are also “per se” illegal.

The Foley case received a great deal of attention and, as a result, virtually every U.S. real estate licensing board incorporated lessons on anti-trust violations in their licensing curriculums. NAR also made efforts to educate its members on avoiding antitrust allegations.

Another lawsuit in the early 1990s was a catalyst for industry-wide change. Jamie D. Bokusky, a buyer who worked with an Edina Realty<sup>1</sup> agent when she bought a Minneapolis-area home listed for sale with another Edina agent. Bokusky said in the suit that her interests were not served when a garden hose faucet was misrepresented as a sprinkler system and that she felt she was pressured into a hasty decision to buy the home.

Bokusky was first informed in writing about her agent's legal role when it was presented as a clause in the purchase contract she signed, The form indicated that Bokusky's agent was a

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<sup>1</sup> At the time, Edina Realty was one of the largest independent brokerage firms in the U.S.

buyer's agent when it appeared that the agent was a dual agent.<sup>2</sup> Bokusky's allegation created several class-action lawsuits against Edina Realty.

Eventually, thousands of Minneapolis home buyers and sellers shared in settlements worth a combined \$19.9 million that ended three lawsuits brought against Edina Realty over dual agency status.

While a settlement of almost \$20 million sounds insignificant by today's standards, the outcome of the Edina case was to send shock waves through the U.S. brokerage business. Many residential firms unwittingly practiced undisclosed dual agency by failing to make it clear that buyers were often represented in transactions and that most agents working *with* buyers did not work *for* them. Up until the mid-1990s, most residential buyers were unrepresented in brokerage transactions; the broker with whom they worked were actually sub-agents of the listing firm and of the seller.

Over the next few years, many licensing authorities determined whether or not dual agency could be lawfully practiced in their states. While six states decided not to permit dual agency, most states agreed it could be practiced if certain rules were followed.

North Carolina license law permits dual agency; however, any agreement for dual agency must be in writing and signed by both parties.<sup>3</sup>

The Edina case also provided a catalyst for the growth of buyer representation. Unfortunately, there were no meaningful discussions about how buyer brokers could be compensated. As a result, buyer brokers continued to seek their compensation from sellers and listing brokers. Moreover, many of them asked for compensation to be paid based on a commission on the sales practice, a counter-intuitive practice for someone representing the buyer. Last, lenders continued to maintain that buyers could not finance the buyer-broker compensation, making it difficult for a buyer broker to be paid any other way than from the seller.

These problems led to the tsunami of lawsuits that began in 2019. (See discussion below.)

### **Fixing Commission Rates**

A form of illegal antitrust behavior is agreeing on a commission split. Price fixing is prohibited. This means that competing brokers, real estate governing bodies, or multiple listing organizations cannot agree to set sale conditions, fees, or management rates.

Nevertheless, it is common to see brokerage firms advertising commission splits as seen in this example:

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<sup>2</sup> <https://www.washingtonpost.com/archive/realestate/1993/05/08/minnesota-case-is-seen-as-key-test/af36bdaa-29d1-49e0-95fb-22933982a9f6/>

<sup>3</sup> For a very thorough discussion of NC's practice of dual agency, see <https://www.ncrec.gov/Pdfs/genupdate/2022-2023%20Section%20%20Dual%20Agency.pdf>

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LA:JIM HALE S:TERRY PETERSON RESIDENTIAL C



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 410 REDWOOD COURT  
 MILL CREEK YB:1997

Area:320 MEB Grid:Z99  
 BR: 4 BA: 2/1 RM: 9  
 SQFT-HT.: 2,000 UHT: 600

LT:43 X 131 X 150 X 137  
 TAX-V: \$ R: 1.0200  
 ACRE: .3 ZONE:RES  
 HOA/M: 28 City?:Y LT#:72

E M YODER WOODLAWN MID  
 SOUTH MEBANE E ALAMANCE HI

LIV: 11X12F MBR: 16X13S  
 DIN: 10X11F BR2: 11X12S  
 FAM: 15X14F BR3: 11X10S  
 KIT: 11X13F BR4: 19X14S  
 BRK: 8X10F STD: X

DIR:185/40 TO EXIT 154 ONTO MEBANE UA  
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TYPE -Detached	W/HTR-Gas	PARKG-2 Garage	M/INT-Attic/PDS
STYLE-Transition	A/C -CentralAir	LOT -Open	TubSepShw
EXTER-SeeRemarks	HEAT -Dual Zone	Wooded Lot	Tub/Showe
BSMNT-None	FUEL -Nat.Gas	ASSUM-No Assump	9ft Ceil.
ROOF -Shingle	FPLAC -InFamilyRm	ROOMS-EntryFoyer	W/D -Kitchen
FLOOR-Carpt/Wood	WA/SW-City Sewer	FamilyRm	EQUIP-Dishwashe
CerBathFlr	City Water	M/EXT-Deck	Disposal
		Gutters	ElecDryrH
		Warr.Progr	IceMkrCon

TRAD FLOOR PLAN W/BAY WINDOW IN F LIV RM. DUAL ACCESS  
 STAIRCASE. BIG KITCH W/ISLAND & LAUNDRY AREA. FAM RM W/WALL OF  
 WINDOWS OVERLOOKING BACK DECK. FLAT. WOODED LOT. HARDIPLANK

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S:C. RICHARD DOBSON BLDRS, INC

This illustration is an example of potential price-fixing and a potential violation of anti-trust laws. It is also one of the issues in current litigation against the National Association of Realtors (NAR) and Realtor-owned multiple listing services. NAR points out that "...listing brokers may not agree on the commission 'split' to be paid to compensate cooperating brokers who produce a ready, willing, and able buyer for a listed property. Conspiracies among competitors to fix the compensation paid to cooperating brokers may also be deemed per se illegal." NAR explains that "...brokers must determine their cooperative compensation policies in the same unilateral and independent manner that they establish the commission or fees charged to clients."

In this illustration the listing firm is offering any selling firm a 2.5% commission split. In doing so, it is setting the price of any buyer brokerage's service at a fixed fee. This advertising practice and offer of compensation has continued for decades.

*Note: It is permissible, however, for listing brokers and selling brokers to discuss the commission they will pay to each other in connection with each individual transaction, which should take place in advance of an offer.*

**Group Boycotts**

Group boycotting is usually considered a “per se” violation of the antitrust laws. In certain instances, group boycotts may also be analyzed under the “Rule of Reason” standard. As pointed out by NAR, “a group boycott is a concerted refusal to deal with a particular party, such as when two or more businesses agree to refuse to deal with another competitor in order to force a change in a competitor’s behavior or to attempt to drive the competitor out of business.”

Often the target of the alleged boycott is a broker that employs a ‘discount,’ ‘alternative,’ or other non-traditional commission/compensation arrangement with clients.” The group boycott’s primary effect is to eliminate a competitor in the market.

### **Penalties for Anti-Trust Violations**

An individual may be fined a maximum of \$100,000 and be sentenced to up to three years in prison-and a corporation may be fined up to \$1 million for breach of the Sherman antitrust laws. In a civil suit, an aggrieved person may recover up to triple the value of the actual damages plus attorneys' fees and costs.

### **Best practices**

To avoid being accused of anti-trust violations, brokers should:

- Discuss only their companies’ policies regarding compensation.
- Avoid discussing compensation in gatherings with competitors.
- Never say to a consumer, “We charge x%. All the brokers around here do.”
- Never say to a consumer, “No broker wants to work with KLM Realty. They don’t pay the standard commission split.”
  - Show property based on a client’s needs, not solely on the offered compensation.
  - Boycott competitors’ listings.
- Participate in a boycott where a broker is denied access to the MLS or other similar services.

Brokers should not say:

- Everyone charges this rate.
- The Board/Association says we have to charge X.
- The best way to handle Broker X is to not do business with him.
- Why is Broker X advertising here? This is our territory.
- You shouldn’t sign with Broker X; nobody does business with him.
- Let’s not deal with Broker X; he’s not a professional; he hires part-timers.
- Let’s agree to always split commissions like this...
- I bet they’d drop their discount program if we refused to do business with them.

### **Summary of preventative measures**

Brokers should:

- Never make derogatory remarks about a competitor. Compete by showing how good your services are.
- Never discuss or use the Board/Association of REALTORS®, MLS meetings, or other broker meetings or real estate professional gatherings to discuss “dealing with” or “boycotting” alternative service brokers or any real estate service provider.
- Never have discussions regarding commission splits or payment of referral fees unless discussing a particular transaction with the other broker involved in the transaction.
- Never discuss your firm’s commission rate or referral fee structure with real estate professionals outside your firm, unless discussing an on-going transaction that you are mutually working to complete.
- Never imply or suggest that commissions are set by a group of brokers or the Board/Association of Realtors.

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While many news outlets report that the “typical” brokerage fee is 6% of the purchase, that information is incorrect. The average brokerage fee in the United States fell to an all-time low in 2020, remaining below 5%.

Real Trends, a Colorado-based research firm that issues a widely cited survey on the topic, says the average commission slid to 4.9% in 2020 from 4.96% in 2019 and 5.03%. Commissions typically decline in strong seller’s markets like that of 2020-21, years when homes sold quickly, and many sellers were inundated with multiple offers over the list price.

The decline in average commissions may be a result of many factors: the large number of real estate agents vying for a small number of deals also encourages Realtors to compete by cutting their fees; a growth in the number of discount / nontraditional firms; and an and an increase in consumer willingness to ask about fees.

However, the decline in commission rates has been offset by rising home prices. Brokers get a smaller piece of the pie, but the pie is getting bigger.

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## **THE ROLE OF THE NORTH CAROLINA REAL ESTATE COMMISSION (NCREC)**

The NCREC does not arbitrate commission disputes, nor does it set commission rates.

However, the NCREC does require that North Carolina brokers have a written employment (agency agreement) with clients, whether they are buyers, sellers, landlords or tenants as per rule 21 NCAC 58A .0104 . See following:

AGENCY AGREEMENTS AND DISCLOSURE (a) Every agreement for brokerage services in a real estate transaction and every agreement for services connected with the management of a property owners association ***shall be in writing and signed by the***

***parties thereto.* Every agreement for brokerage services between a broker and an owner of the property to be the subject of a transaction shall be in writing and signed by the parties at the time of its formation.**

**Every agreement for brokerage services between a broker and a buyer or tenant shall be express and shall be in writing and signed by the parties thereto not later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another. However, every agreement between a broker and a buyer or tenant that seeks to bind the buyer or tenant for a period of time or to restrict the buyer's or tenant's right to work with other agents or without an agent shall be in writing and signed by the parties thereto from its formation.**

**A broker shall not continue to represent a buyer or tenant without a written, signed agreement when such agreement is required by this Rule.**

Every written agreement for brokerage services of any kind in a real estate transaction shall be for a definite period of time, shall include the broker's license number, and shall provide for its termination without prior notice at the expiration of that period, except that an agency agreement between a landlord and broker to procure tenants or receive rents for the landlord's property may allow for automatic renewal so long as the landlord may terminate with notice at the end of any contract period and any subsequent renewals. Every written agreement for brokerage services that includes a penalty for early termination shall set forth such a provision in a clear and conspicuous manner that shall distinguish it from other provisions of the agreement. For the purposes of this Rule, an agreement between brokers to cooperate or share compensation shall not be considered an agreement for brokerage services and, except as required by Rule .1807 of this Subchapter, need not be memorialized in writing.

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A broker is required by the rules of the NC Real Estate Commission to **fully and timely disclose to the agent's client the expected receipt of any compensation, incentive, bonus, rebate, or other consideration of more than nominal value from another party or person** (e.g., a listing firm or seller).

According to the rule, "full" disclosure includes a description of the compensation, incentive, bonus, rebate or other consideration, including its value.

If a buyer agency agreement describes all the compensation to be received, including its value, no further disclosure is required. If compensation in addition to that described in the Buyer Agency Agreement is offered on a property the buyer client wants to see, the additional compensation should be disclosed orally before or at the time the agent shows the property and then confirmed in writing if the buyer decides to make an offer on that property. (NCAR Form 770 was designed to satisfy the written confirmation requirement.)

### **Employment forms**

North Carolina brokers can use any employment/agency agreement they choose. The NCREC does not "bless" any particular agency agreement form as long as the form complies with its rules.

However, many residential brokers are members of the North Carolina Association of Realtors and have access to its library of forms.

Let's take a look at how the North Carolina Association of Realtor (NCAR) buyer broker agreement form (201) discusses compensation:

**4. COMPENSATION OF FIRM.**

- (a) Firm acknowledges receipt of a non-refundable retainer fee in the amount of \$ \_\_\_\_\_ which  
 shall  shall not be credited toward any compensation due Firm under this Agreement.
- (b) Buyer agrees that Firm's fee for services hereunder shall be in the amount of \_\_\_\_\_ ("Fee")

*(Insert dollar amount, percentage of purchase price, or other method of determining Firm's compensation for each type of property the Buyer may purchase, such as resale, new construction, land/lot and/or unrepresented seller. Do not insert N/A or a zero (\$0)).*

- (i) Firm shall seek the Fee from a cooperating listing firm (through the listing firm's offer of compensation in MLS or otherwise) or from the seller if there is no listing firm, and Buyer agrees that Firm shall be entitled to receive same in consideration for Firm's services hereunder.
- (ii) If Buyer purchases property where the compensation offered by the listing firm and/or seller is less than the Fee, or where no compensation is offered by either the listing firm or the seller, Buyer and Firm agree that Buyer will pay the difference between the Fee and the compensation offered unless prohibited by law. Firm will timely inform Buyer if the compensation offered is less than expected. Per federal regulations, a buyer obtaining a VA loan is not permitted to pay a brokerage fee or commission in connection with the services of a buyer agent, though use of a buyer agent is permitted. Firm may still seek compensation pursuant to paragraph 4(b)(i) if Buyer is seeking a VA loan.
- (iii) If additional compensation, incentive, bonus, rebate and/or other valuable consideration ("*Additional Compensation*") is offered through the MLS or otherwise, Buyer will permit the Firm to receive it in addition to the Fee. Firm shall timely disclose the promise or expectation of receiving any such Additional Compensation and confirm the disclosure in writing

The form permits brokers to be paid a nonrefundable retainer fee as well as a fee. Note that "fee" can be interpreted to be a percentage of purchase price or "other method," such as hourly wage or flat fee.

Of critical importance is passage b(i) which makes it clear that the buyer brokerage firm will first seek the fee from

- 1) A cooperating listing fee though the listing firms offer of compensation in MLS (*The NAR has offered to change language regarding cooperation and compensation via the MLS as part of a proposed settlement. See later discussion.*);
- 2) If there is no listing fee, then the fee will be sought from the seller;
- 3) If option 1 or 2 are not obtainable, the buyer agrees to pay the difference between the fee and the compensation offered.

*Note that the buyer must be informed in a timely manner so that the buyer can make an informed decision about whether to proceed to make an offer or not.*

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*Caution for agents working with veteran-buyers:* Per federal regulations (38 CFR 36.4312), fees or commissions charged by a real estate agent or broker in connection with a VA-guaranteed loan may not be charged to or paid by the veteran-buyer. While use of buyer agents is not precluded, veteran-buyers may not be charged a brokerage fee or commission in connection with the services of such individuals.

*(NAR is communicating with the VA and other federal lending regulators regarding rule changes.<sup>4</sup>)*

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### **Best practices**

Listing agents should:

- Discuss with their seller-clients how brokers can (but do not have to) compensate buyer brokers.
- Discuss with sellers some of the advantages of buyers being represented by a buyer broker.
- Give sellers a choice about paying any buyer broker fee as well as discuss the listing fee. Remind sellers that all fees are negotiable.

Buyer brokers should:

- Discuss their fees with buyer clients and review the appropriate passages in any buyer representation agreement.
- Remind buyers that there are options for how fees may be paid and by whom.
- Prior to any showing, contact the listing agent to discuss buyer brokerage compensation and secure a written agreement with the listing firm as well as with the seller regarding the listing firm and/or the seller paying the buyer-broker.

### **Process**

As a reminder, the NCREC requires that brokers discuss agency relationships at first substantial contact in any sales transaction.

The Commission has created a new disclosure form in 2021 (“Working With Real Estate Agents Disclosure”) which will make agency disclosure quicker and easier for brokers and more understandable for buyers and sellers. The form is just two pages in length, with one page dedicated to sellers and one page dedicated to buyers. A broker explaining agency to a seller need only review the seller side of the form; likewise, a broker disclosing agency relationships to a buyer need only review the buyer side.

Let’s examine the critical passage in the disclosure to sellers:

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<sup>4</sup> <https://www.veteransunited.com/education/nar-commission-settlement/#:~:text=A%20recent%20court%20settlement%20proposed,pay%20real%20estate%20agent%20commissions.>

**Note to Agent:** Check all relationship types below that may apply to this seller.

\_\_\_\_\_ **Seller's Agency** (listing agent): The agent who gave you this form (and the agent's firm) must enter into a written listing agreement with you before they begin to market your property for sale. If you sign the listing agreement, the listing firm and its agents would then represent you. The buyer would either be represented by an agent affiliated with a different real estate firm or be unrepresented.

\_\_\_\_\_ **Dual Agency:** Dual agency will occur if your listing firm has a buyer-client who wants to purchase your property. If you agree in a written agency agreement, the real estate firm, and any agent with the same firm (company), would be permitted to represent you and the buyer at the same time. A dual agent's loyalty would be divided between you and the buyer, but the firm and its agents must treat you and the buyer fairly and equally and cannot help you gain an advantage over the other party.

\_\_\_\_\_ **Designated Dual Agency:** If you agree in a written agency agreement, the real estate firm would represent both you and the buyer, but the firm would designate one agent to represent you and a different agent to represent the buyer. Each designated agent would be loyal only to their client.

\_\_\_\_\_ **Buyer Agent Working with an Unrepresented Seller** (For Sale By Owner, "FSBO"): The agent who gave you this form will not be representing you and has no loyalty to you. The agent will represent only the buyer. Do not share any confidential information with this agent.

**Note to Seller:** For more information on an agent's duties and services, refer to the NC Real Estate Commission's "Questions and Answers on: Working With Real Estate Agents" brochure at [ncrec.gov](http://ncrec.gov) (Publications, Q&A Brochures) or ask an agent for a copy of it.

_____	_____	_____	_____	_____
Seller's Signature	Print Name	Seller's Signature	Print Name	Date
_____		_____	_____	
Agent's Name		Agent's License No.	Firm Name	

Many brokers complete this section of the disclosure form incorrectly. Brokers should initial *only those passages* that pertain to a particular seller and his/her possible transaction.

This form "mirandizes" and educates sellers to the possibility of a confidential/fiduciary relationship with the broker. It does not create an agency contract with the seller.

### Best practices

- During the conversation with the seller, discuss your firm's compensation and the possibility of buyer brokerage compensation.
- Show the NCREC video on this form to the seller:  
<https://www.ncrec.gov/Resources/VideoLibrary>

The form for the buyer must also be given to buyer-consumers at first substantial contact. Note that should a broker check the first choice, this form would provide an excellent time to discuss brokerage compensation.

This form is not a contract, nor does it create any obligations between the buyer and the broker to establish an agency relationship. Just as with the form above, it provides an opportunity to discuss matters which may lead to a representation agreement later.

**Note to Agent:** Check all relationship types below that may apply to this buyer.

\_\_\_\_\_ **Buyer Agency:** If you agree, the agent who gave you this form (and the agent's firm) would represent you as a buyer agent and be loyal to you. You may begin with an oral agreement, but your agent must enter into a written buyer agency agreement with you before preparing a written offer to purchase or communicating an oral offer for you. The seller would either be represented by an agent affiliated with a different real estate firm or be unrepresented.

\_\_\_\_\_ **Dual Agency:** Dual agency will occur if you purchase a property listed by the firm that represents you. If you agree, the real estate firm and any agent with the same firm (company), would be permitted to represent you and the seller at the same time. A dual agent's loyalty would be divided between you and the seller, but the firm and its agents must treat you and the seller fairly and equally and cannot help you gain an advantage over the other party.\*

\_\_\_\_\_ **Designated Dual Agency:** If you agree, the real estate firm would represent both you and the seller, but the firm would designate one agent to represent you and a different agent to represent the seller. Each designated agent would be loyal only to their client.\*

*\*Any agreement between you and an agent that permits dual agency must be put in writing no later than the time you make an offer to purchase.*

\_\_\_\_\_ **Unrepresented Buyer (Seller subagent):** The agent who gave you this form may assist you in your purchase, but will not be representing you and has no loyalty to you. The agent will represent the seller. Do not share any confidential information with this agent.

**Note to Buyer:** For more information on an agent's duties and services, refer to the NC Real Estate Commission's "Questions and Answers on: Working With Real Estate Agents" brochure at [nrec.gov](http://nrec.gov) (Publications, Q&A Brochures) or ask an agent for a copy of it.

\_\_\_\_\_  
Buyer's Signature

\_\_\_\_\_  
Buyer's Signature

\_\_\_\_\_  
Date

## Best practices

- During the conversation with the buyer, discuss your firm's compensation and the possibility of buyer brokerage compensation.
- Show the NCREC video on this form to the buyer:  
<https://www.ncrec.gov/Resources/VideoLibrary>

Once a consumer has been "mirandized,"<sup>5</sup> brokers should then ask consumers whether they wish to enter into a brokerage agreement. With sellers, brokers must secure a commitment in writing immediately. The listing/agency agreement must have compensation spelled out in the form that the sellers sign.

With buyers, the signing of a written representation / agency agreement can be delayed up to the point of the buyer needing assistance with developing an offer; however, given the need to arrange for the possibility of a buyer paying the buyer brokerage firm directly, it would be wise to have a representation agreement signed early in the relationship.

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<sup>5</sup> The term "mirandized" refers to letting parties to a transaction know that they have the right to representation from a broker if they choose. The requirement to give Miranda warnings is required when a police officer arrests and individual. This requirement came from the Supreme Court decision, *Miranda v. Arizona*, 384 US 436 (1966).

## Getting paid

Most real estate brokerage firms indicate on their agency agreements that they will be paid at closing. In the past, it was common practice to see a commission amount appear on the seller's side of the closing disclosure form for the entire amount and then see a transfer of part of the amount paid to the selling or buyer brokerage firm.

One possibility is that in the near future, buyers are going to have a debit on their side of the closing statement for the buyer broker's fee.

If buyers do not have the funds to pay their own broker, one possible accommodation will be to have the seller pay for all or part of the buyer brokerage fee by using a passage commonly found in the offer form:

(j) Agreement to Pay Buyer Expenses: Seller shall pay at Settlement \$ \_\_\_\_\_ toward any of Buyer's expenses associated with the purchase of the Property, at the discretion of Buyer and/or lender, if any, including any FHA/VA lender and inspection costs that Buyer is not permitted to pay.

(This passage is from the current NCAR form 2-T.)

It is permissible to use this passage for the purpose of compensating the buyer so that the buyer can then pay his/her broker. However, lenders may object to an amount that they consider outside the limit of seller concessions.

*NOTE: Brokerage compensation cannot be in an offer to purchase form, according to NCREC rules. Brokerage compensation must be in agency agreements or some other writing. Observe that the illustration above is NOT a discussion of compensation but rather "buyer's expenses associated with the purpose of the property."*

## CURRENT LITIGATION

The reason for the unease regarding brokerage compensation for many brokers, Realtors and non-Realtors alike, may be due to more recent litigation.

### 2019

On March 6, 2019, an antitrust class action was filed in the U.S. District Court, Northern District of Illinois on behalf of home sellers who paid a broker commission in the last four years in connection with the sale of residential real estate listed on one of twenty Multiple Listing Services ("MLSs"), covering several major metropolitan areas in the Mid-Atlantic, Mid-West, South-West, Mountain-West, and Southeast regions. This case is known as *Moehrl v. National Association of Realtors, et al.*

Plaintiffs, home sellers who listed their homes on one of twenty MLSs bring this action against the National Association of Realtors (NAR) and the four largest national real estate broker franchisors, Realogy Holdings Corp., HomeServices of America, Inc., RE/MAX Holdings, Inc., and Keller Williams Realty, Inc., for conspiring to require home sellers to pay the broker representing the buyer of their homes, and to pay at an inflated amount, in violation of federal antitrust law. This litigation is the Moehrl case.

Here are the allegations:

Plaintiffs allege that Defendants' conspiracy has centered around NAR's adoption and implementation of a mandatory rule that requires all brokers to make a blanket, non-negotiable offer of buyer broker compensation (the "Buyer Broker Commission Rule") when listing a property on an MLS.

Most MLSs (including all MLSs at issue in this case) are controlled by local NAR associations, and access to such MLSs is conditioned on brokers following all mandatory rules set forth in NAR's *Handbook on Multiple Listing Policy*, including the Buyer Broker Commission Rule.

The conspiracy, plaintiffs allege, has saddled home sellers with a cost that would be borne by the buyer in a competitive market. Moreover, because most buyer brokers will not show homes to their clients where the seller is offering a lower buyer broker commission, or will show homes with higher commission offers first, sellers are incentivized when making the required blanket, non-negotiable offer to procure the buyer brokers' cooperation by offering a high commission.

The mandatory Buyer Broker Commission Rule ensures that price competition among buyer brokers is restrained because the person retaining the buyer broker, the buyer, does not negotiate or pay his or her broker's commission. In addition, the seller's inflated commission offer cannot be reduced by buyers or their brokers, as Defendants also prohibit buyer brokers from making home purchase offers contingent on the reduction of the buyer broker commission. Absent this rule, buyer brokers would be paid by their clients and would compete to be retained by offering a lower commission.

Currently, total broker compensation in the United States is typically five to six percent of the home sales price, with approximately half of that amount—and increasingly more than half—paid to the buyer broker. Defendants' conspiracy has kept buyer broker commissions in the 2.5 to 3.0 percent range for many years despite the diminishing role of buyer brokers due to buyers independently identifying homes through online services and retaining buyer brokers only after they have found the home they wish to buy.

The conspiracy has inflated buyer broker commissions, which, in turn, have inflated the total commissions paid by home sellers, who have incurred, on average, thousands of dollars in damages as a result of Defendants' conspiracy.

MLSs covered in this action:

The Bright MLS (including the metropolitan areas of Baltimore, Maryland; Philadelphia, Pennsylvania; Richmond, Virginia; Washington, D.C.);

My Florida Regional MLS (including the metropolitan areas of Tampa, Orlando, and Sarasota);

The five MLSs in the Mid-West that cover the following metropolitan areas: Cleveland, Ohio; Columbus, Ohio; Detroit, Michigan; Milwaukee, Wisconsin; Minneapolis, Minnesota;

The six MLSs in the Southwest that cover the following metropolitan areas: Austin, Texas; Dallas, Texas; Houston, Texas; Las Vegas, Nevada; Phoenix, Arizona; San Antonio Texas;

The three MLSs in the Mountain West that cover the following metropolitan areas: Colorado Springs, Colorado; Denver, Colorado; Salt Lake City, Utah;

The four MLSs in the Southeast that cover the following metropolitan areas: Fort Myers, Florida; Miami, Florida; Charlotte, North Carolina; and Raleigh, North Carolina.

**2020**

The Department of Justice took NAR to court in 2020 over NAR's rules, policies, and practices that are widely adopted by its members which result in a lessening competition among real estate brokers to the detriment of American home buyers. These rules, policies, and practices, according to the DOJ, include:

- Prohibiting multiple listing services (“MLSs”) from disclosing to prospective buyers the amount of commission that the buyer broker will earn if the buyer purchases a home listed on the MLS (“NAR’s Commission Concealment Rules”);
- Allowing buyer brokers to mislead buyers into thinking that buyer broker services are free (“NAR’s Free-Service Rule”);
- Enabling buyer brokers to filter MLS listings based on the level of buyer broker commissions offered and to exclude homes with lower commissions from consideration by potential home buyers (“NAR’s Commission-Filter Rules and Practices”); and
- Limiting access to lockboxes that provide licensed brokers physical access to a home that is for sale to only those real estate brokers who are members of a NAR-affiliated MLS (“NAR’s Lockbox Policy”).

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The DOJ sued NAR over these rules. Here are some of the details from the DOJ’s analysis:

Among other activities, NAR establishes and enforces rules, policies, and practices, which are adopted by NAR’s 1,400+ local associations (also called “Member Boards”) and their affiliated multiple listing services that govern the conduct of NAR’s approximately 1.4 million-member REALTORS® who are engaged in residential real estate brokerages across the United States.

The DOJ alleges that NAR, through its Member Boards, controls a substantial number of the MLSs in the United States. NAR promulgates rules, policies, and practices governing the conduct of NAR-affiliated MLSs that are set annually in the Handbook on Multiple Listing Policy (“Handbook”).

Under the terms of the Handbook, affiliated REALTOR® associations and MLSs “must conform their governing documents to the mandatory MLS policies established by [NAR’s] Board of Directors to ensure continued status as member boards and to ensure coverage under the master professional liability insurance program.”

NAR and its affiliated REALTOR® associations and MLSs enforce the Handbook’s rules, policies, and practices as well as the rules, policies, and practices set forth in NAR’s Code of Ethics. NAR’s Code of Ethics states that “[a]ny Member Board which shall neglect or refuse to maintain and enforce the Code of Ethics with respect to the business activities of its members may, after due notice and opportunity for hearing, be expelled by the Board of Directors from membership” in NAR.

The DOJ also claimed that these rules, policies and practices violate the antitrust laws. NAR’s real estate broker members are direct competitors for the provision of listing broker and buyer broker services. NAR’s and its affiliated MLSs’ adoption and enforcement of these rules, policies, and practices reflect concerted action between horizontal competitors and constitute agreements among competing real estate brokers that reduce price competition among brokers and lead to higher prices and lower quality service for American home buyers and sellers.

The DOJ further alleged that these agreements individually and collectively unreasonable restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Alleged Unlawful Agreements NAR's "Commission-Concealment Rules"

What are the "Commission-Concealment Rules"? NAR's Commission-Concealment Rules recommend that MLSs prohibit disclosing to prospective buyers the total commission offered to buyer brokers. All or nearly all NAR-affiliated MLSs have adopted a prohibition on disclosing commissions offered to buyer brokers. This means that while buyer brokers can see the commission that is being offered to them if their home buyer purchases a specific property – a commission that will ultimately be paid through the home purchase price that the home buyer, represented by the buyer broker, pays – MLSs conceal this fee from home buyers.

NAR's Commission-Concealment Rules relieve buyer brokers from the necessity of competing against each other by offering rebates or offering to accept lower commissions. These rules also make home buyers both less likely and less able to negotiate a discount or rebate off the offered commission. NAR's Commission-Concealment rules encourage and perpetuate the setting of persistently high commission offers by sellers and their listing agents. The result is higher prices for buyer broker services.

Can the "Commission-Concealment Rules" lead to other anticompetitive effects? . Because of the Commission-Concealment Rules, buyer brokers may steer potential home buyers away from properties with low commission offers by filtering out, failing to show, or denigrating homes listed for sale that offer lower commissions than other properties in the area. When buyers can't see commission offers, they can't detect or resist this type of steering. Steering not only results in higher prices for buyer broker services, but it also reduces the quality of the services that are rendered to the potential home buyer, making it less likely that the buyer will ultimately be matched with the optimal home choice. Fear of having buyers steered away from a property is also a strong deterrent to sellers who would otherwise offer lower buyer broker commissions, which further contributes to higher prices for buyer broker services. NAR's "Free-Service Rule"

What is the "Free-Service Rule"? NAR's Free-Services Rule allows buyer brokers to mislead buyers into thinking the buyer broker's services are free and hiding the fact that buyers have a stake in what their buyer brokers are being paid.

Why is the "Free-Service Rule" allegedly anticompetitive? Buyer broker fees, though nominally paid by the home's seller, are ultimately paid out of the funds from the purchase price of the house. If buyers are told that buyer broker services are "free," buyers are less likely to think to negotiate a lower buyer broker commission or to view buyer broker rebate offers as attractive. In these ways, NAR's Free-Service Rule likely leads to higher prices for services provided by buyer brokers.

What are NAR's Commission-Filter Rules and Practices? NAR's Commission-Filter Rules and Practices allow buyer brokers to filter MLS listings that will be shown to buyers based on the level of buyer broker commissions offered. Once this filtering is performed, some MLSs further permit buyer brokers to affirmatively choose not to show certain homes to potential home buyers if the buyer broker will make less money because of lower commissions. Homes may be filtered out in this manner even if they otherwise meet the buyer's home search criteria. For example, buyer brokers or agents may use an MLS's software to filter out any listing where buyer broker will receive less than 2.5% commission on the home sale. The buyer broker would then provide to its home buyer customer only those listings where the buyer broker would be paid a 2.5% commission or more if the home sale is completed.

Why are NAR's Commission-Filter Rules and Practices allegedly anticompetitive? NAR's Commission-Filter Rules and Practices are anticompetitive because they facilitate steering by

helping buyer brokers conceal from potential home buyers any property listings offering lower buyer broker commissions. The practice of steering buyers away from homes with lower buyer broker commissions likely reduces the quality of buyer broker services and raises prices for buyer broker services, both at the expense of home buyers.

What is NAR's Lockbox Policy? Lockboxes hold the keys to a house to allow brokers and potential home buyers to access homes for sale, with permission from the selling homeowner, while continuing to keep the homes secure. Such lockboxes are accessed by a real estate broker using a numerical code or digital Bluetooth® 'key' enabling the real estate broker to show buyer homes that are listed for sale. NAR and its members have adopted a policy and practice that limits access to lockboxes to only those real estate brokers who are members of NAR and subscribe to the NAR-affiliated MLS. Licensed, but non-NAR-affiliated brokers are not allowed to access the lockboxes.

How does NAR's Lockbox Policy allegedly impact competition? Because only real estate brokers that are members of NAR and subscribe to the NAR-affiliated MLS are permitted access to lockboxes, this policy and practice effectively deprives licensed real estate brokers that are not members of NAR from accessing properties for sale to show potential home buyers. This lessens competition for buyer broker services as real estate brokers that are not members of NAR cannot access lockboxes and show properties to their clients. Terms of the Settlement

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In November, 2020, the NAR and the DOJ reached a settlement in this case. However, the DOJ later backed out of the settlement, most likely because it was looking private lawsuits filed in 2019 (read the *Moehrl* case above) to see how those cases would proceed. NAR filed the petition in September 2021 after the Department of Justice announced it was backing out. That petition is still under review.

The proposed settlement with NAR required NAR to repeal, eliminate or modify its rules, practices and policies that the Division alleges violate antitrust law. Under the terms of the settlement, memorialized in the proposed Final Judgment, NAR and its Member Boards must not adopt, maintain, or enforce any Rule, or enter into or enforce any Agreement or practice, that directly or indirectly:

- a. Prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying the compensation offered to other MLS Participants;
- b. Permits or requires MLS Participants, including buyer brokers, to represent or suggest that their services are free or available to a client at no cost to the client;
- c. Permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer broker or the name of the brokerage or agent; or
- d. Prohibits, discourages or recommends against the eligibility of any licensed real estate agent or broker, from accessing, with seller approval, the lockboxes of those properties listed on an MLS.

**2022-2023**

*Sitzer-Burnett* is a class-action lawsuit that was filed in Missouri federal court by a group of home sellers in the state against NAR and other defendants, including Anywhere, Berkshire Hathaway HomeServices, Keller Williams and RE/MAX. The plaintiffs claimed that real estate commission rates are too high, buyers' representatives are paid too much, and NAR's Code of Ethics and MLS Handbook, along with the corporate defendants' practices, lead to inflated commission rates.

In October 2023, the jury ruled in favor of the plaintiffs, awarding damages of \$1.7 billion, an already daunting number that federal antitrust rules then tripled to over \$5 billion. That's right—\$5 billion.

That figure dwarfs the amounts Anywhere (\$83.5 million) and RE/MAX (\$55 million) agreed to in their pre-trial settlements. Keller Williams agreed to pay \$70 million.

## **2024**

In early 2024, the NAR and the DOJ came to a proposed settlement which including these terms and conditions:

Release of liability. Most (not all) members, all state/local REALTOR® associations, all association-owned MLSs, and all brokerages with an NAR member as principal that had a residential transaction volume in 2022 of \$2 billion or less would be released from liability in *Sitzer/Burnett* and *Moehrl Read* the entire proposed settlement agreement [HERE](#).

Compensation offers moving off the MLS, but concessions are allowed. Effective mid-July 2024, NAR has agreed to put in place a new rule prohibiting offers of compensation on the MLS. Offers of compensation could continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals. Sellers will be able to offer buyer concessions on an MLS (like concessions for buyer closing costs), provided that such concessions are not conditioned on the use of or payment to a buyer broker. The types of compensation available for buyer brokers continue to take multiple forms, depending on broker-consumer negotiations (as all business decisions are always made unilaterally and independently). That could include but is not limited to: fixed fee commission paid directly by consumers; à la carte services; seller concessions; a portion of the listing broker's compensation. Compensation continues to be negotiable and should always be negotiated between agents and the consumers they serve.

Written agreements with buyers. Effective in approximately mid-July 2024 (this is subject to change), NAR has agreed to require MLS participants working with buyers to enter into written representation agreements with their buyers.

Settlement payment. NAR would pay \$418 million over the next 4 years if the proposed settlement is approved.

Who is covered by the proposed settlement:

- Over 1 million NAR members.
- All state/territorial and local REALTOR® associations.
- All association-owned MLSs.
- All brokerages with an NAR member principal that had a residential transaction volume in 2022 of \$2 billion or below.

What is not in the proposed settlement:

This is a nationwide release for all sellers and should resolve most of the litigation. While it affects most copycat litigation, there is also the possibility that there will be opt-outs from the proposed settlements.

The proposed settlement does NOT apply to those who had a residential transaction volume in 2022 of more than \$2 billion.

Agents affiliated with HomeServices of America and its related companies (the last corporate defendant still litigating the Sitzer/Burnett case) are NOT released under the proposed settlement, nor are the employees of the remaining corporate defendants named in Sitzer/Burnett and Moherl.

What happens to the other pending antitrust cases:

Because the proposed settlement agreement would not end litigation as to all defendants in all antitrust lawsuits pending across the country in state and federal courts, that other litigation may continue.

In *Batton I* (N.D. Ill.), NAR's answer to plaintiffs' amended complaint is due on April 14, 2024, and there is a status hearing on May 7, 2024.

What comes next:

The proposed settlement is subject to court approval, which is a process that may take several months (or more) and will include an opportunity for interested parties to object. Objections and opt outs are common in large class action cases.

NAR will ask the courts to pause litigation about the MLS cooperative compensation Model Rule pending the settlement approval process.

Several websites have been created for claimants to file for their charge of the settlement. Claimants must submit a claim form by May 9, 2025.

Forms can be submitted online at [www.realestatecommissionlitigation.com](http://www.realestatecommissionlitigation.com). You can also print a claim form at the website and mail it to Burnett et al. v. The National Association of Realtors et al., c/o JND Legal Administration, PO Box 91479, Seattle, WA 98111, or email it to [info@RealEstateCommissionLitigation.com](mailto:info@RealEstateCommissionLitigation.com).

If claimants sold multiple homes during the eligible period, they must submit a separate claim for each.

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Note that the settlement is still pending final approval by a judge. Final approval is expected in November 2024.

## SEPARATING FACT FROM FICTION

One of the outcomes of the numerous media reports regarding the NAR proposed settlement is a lot of mythology about broker compensation.

### Earnings

Much has been made of how high commission rates are in the U.S. Do U.S. brokers really earn more than their counterparts in other countries? See chart below.

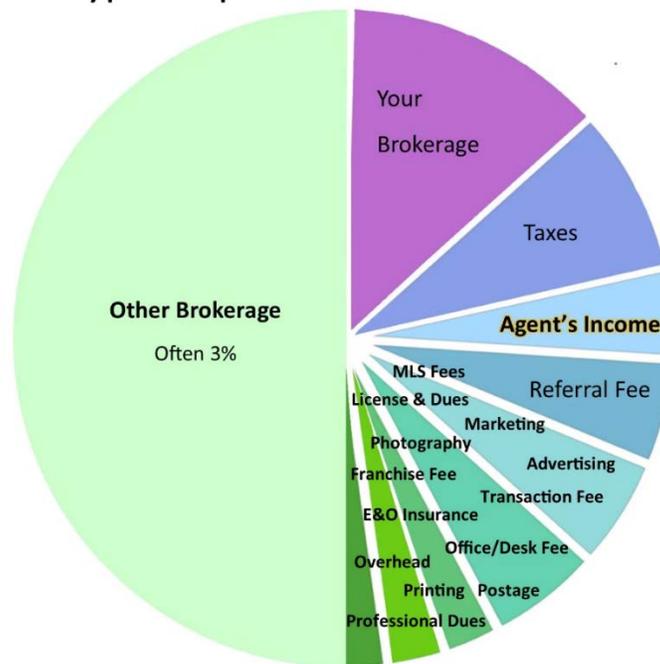
It is difficult to make comparisons since many of these countries do not have a state or federal regulation for real estate licensing. U.S. licensees complete state-required licensing curriculum, pass course tests, and also pass licensing exams. Almost all U.S. licensees are required to pay licensing renewal fees as well as comply with continuing education requirements. They must also comply with state laws and licensing rules.

Australia is cited as a country where commission rates are characterized as low. For example, "Sydney's average real estate agent commission is 1.8% to 2.5%, only slightly higher than the average in Melbourne." However, Australian brokers do not need to have a real estate license to practice brokerage. They use an auction method to sell property which usually results in an immediate commission. Note that average real estate agent salary in Australia is \$115,000 per year or \$58.97 per hour. Entry-level positions start at \$75,000 per year, while most experienced workers make up to \$160,000 per year. These earnings are more than double that of U.S. agents, according to Department of Labor statistics.(See following discussion.)

Country	Buyer commission	Seller commission	VAT
Austria	3	1.0-2.0	20
Croatia	3	3	25
Cyprus	-	3.0-8.0	-
Czech Republic	2.5-5.0	2.5-5.0	15
Finland	-	002.5-5.0 **	24
France	-	004.5-8.0 **	20
Germany	2.0-6.0	-	19
Greece	2	2	24
Hungary	-	3.0-5.0	27
Italy	3.0-5.0	3.0-5.0	10-22
Latvia	-	2.0-5.0	21
Montenegro	-	3.0-5.0	19
Portugal	-	3.0-5.0	23
Slovenia	3	1	9.5
Spain	-	3.0-5.0	6-21
Switzerland	-	3.0-5.0	7.6
Thailand	-	3.0-5.0	7
Turkey	0.0-2.0	2	-
UAE	2	2	-
UK	0.5-3.5	0.5-3.5	17.5
United States	-	2.0-6.0	

Note that according to the Department of Labor, in 2022 real estate brokers earn median pay of \$52,030 annually or \$25.02 per hour.

The following illustration makes it clear that while brokerage fees can earn significant revenues from sales, individual agents often do not. (Also note the potential price-fixing text in the illustration—using “typical” to describe the commission rate and “often” to describe the split.)



Taken from <https://www.bls.gov/ooh/sales/real-estate-brokers-and-sales-agents.htm>

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### A Lack of Transparency

In 2019, the Consumer Federation of America (CFA) released a new report, Hidden Real Estate Commissions: Consumer Costs and Improved Transparency which found that traditional real estate agents and brokers make it difficult for consumers to learn about commission levels. This lack of transparency may give rise to the myth that there is a standard commission.

According to the CFA,

For most major consumer services, it is relatively easy for consumers to access information about prices. This is not the case for an estimated \$100 billion in real estate commissions that are charged to home sellers each year. Traditional firms and agents:

- Do not advertise their commissions.
- Do not include information about their commissions on their websites.
- On these websites, rarely mention that commissions are charged.

- In response to general phone inquiries, usually do not provide information about full commission levels during the call.

In conversations with a prospective home seller, in response to a query about seller costs, usually do not quickly provide information about commission levels (though eventually, nearly all did).

Moreover, the industry restricts the ability of buyers to learn what portion of the commission (“splits”) their buyer agents receive.

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## **SUMMARY**

Depending on the outcome of recent litigation, It’s likely that brokers will have more paperwork and forms as a result of the settlement.

For one, as part of the listing process, listing brokers should demonstrate more transparency about the choices their seller-clients have in terms of the type of professional fee they pay for brokerage services. Listing brokers should also discuss the options to sellers regarding paying a separate fee for the buyer broker to have representation of for the listing firm to share in the fee with the selling firm. These discussions should be memorialized in writing for the benefit of all the parties, including prospective buyer brokers and purchasers.

Two, prior to showing a property, it will be critical for buyer brokers to negotiate how their buyers will be able to pay for their services. Buyer brokers should explain and disclose the possible options for a buyer broker to be paid by the buyer, by the listing firm, by the seller or a combination thereof. Further, buyer brokers should discuss with listing agents what various options are for commission sharing. It is important to emphasize that these discussions with principals should take place early in the formation of relationships with consumers..

As a reminder, the current NCAR buyer representation agreement states the buyer brokerage firm shall seek the fee from a cooperating listing firm or from the seller if there is no listing firm, and if there is no compensation or it’s less than what the buyer said he/she would pay, the buyer will pay the fee.

Should the seller or the listing firm consent to paying the buyer brokerage firm, that consent should be in writing.

Should there be any feel-splitting between the listing firm and the buyer brokerage firm, that split should also be acknowledged, preferably in writing and signed by all parties.

Brokers may wish to consult with their brokers-in-charge and company attorneys about characterizing any fee paid by the seller to the buyer brokerage firm as a buyer closing cost in provisions of the sales contract. However, brokers cannot mention their fees in a sales contract, as per NCREC rules. Thus any agreement for the seller to pay a commission to any of the brokers must be in a separate compensation agreement.

In sum, brokers must be more transparent in how they earn their fees.

Additionally, while NAR boasts 1.5 million members, there are at least that many brokers in the U.S. who are not members of NAR, and as such, they will be affected not only by public opinion but also by their licensing boards actions.

It's likely that there will be chaos and confusion if the settlement proposal is agreed to by the DOJ and the NAR. It's likely that NAR and MLSes will begin to proactively de-couple promises of cooperation and compensation. There will be more paperwork in the listing process and showing protocols. It's also likely that the VA and mortgage lending industries are going to have to revisit their rules.

Will anyone benefit? That remains to be seen.



#### **THE AUTHOR**

Deborah H. Long is a licensed real estate instructor in North Carolina. She completed her doctorate in educational leadership in 1994. Her research on the effect of ethics instruction on the ethical reasoning of real estate brokers received national media and industry attention. She has three other college degrees. She has been a teacher for more than 50 years.

In addition to holding a GRI (Graduate Realtor Institute), CDEI (Certified Distance Education Instructor) and CRS (Certified Residential Specialist) designations, Deborah earned the DREI (Distinguished Real Estate Instructor), the most prestigious designation for excellence in teaching offered by the Real Estate Educators Association.

She is the award-winning author of many articles and education programs as well as 18 real estate textbooks. Her real estate ethics program for educators has received the "Best Single Education Program" award from the Real Estate Educators Association and from the NC Real Estate Educators. The North Carolina Real Estate Educators Association recognized Deborah as "Educator of the Year." She was also the editor of the prestigious REEA Journal for 10 years.

Deborah's real estate ethics research has been featured in the Wall Street Journal and on numerous radio talk shows. Her research has led her to write *Doing the Right Thing: A Real Estate Practitioner's Guide to Ethical Decision Making*, now available in its 4th edition.

She has been a proponent of online education since it became available and has taught numerous educators about technology. She earned the prestigious Certified Distance Education Instructor designation from ARELLO (Association of Real Estate License Law Officials).

Deborah was named Tar Heel of the Week in 2017 for her contributions to the community. Debbie can be reached at [DebbieTheTeacher@gmail.com](mailto:DebbieTheTeacher@gmail.com).



## ADDITIONAL READING

NAR's position:

[https://cdn.nar.realtor/sites/default/files/documents/nar-settlement-factsheet-2024-03-15.pdf?\\_gl=1\\*1kjd3d\\*\\_qcl\\_au\\*MTIONzMOMTq0Ny4xNzA3NDk0NDMz](https://cdn.nar.realtor/sites/default/files/documents/nar-settlement-factsheet-2024-03-15.pdf?_gl=1*1kjd3d*_qcl_au*MTIONzMOMTq0Ny4xNzA3NDk0NDMz)

NC take on lawsuits:

[https://edition2.newsobserver.com/popovers/dynamic\\_article\\_popover.aspx?artguid=0815e84a-1596-4279-9f60-84648fc216f2&appcode=OBSERV&eguid=d158069b-58f5-4803-a670-a90da4c308b6&pnum=15#?deviceId=3C5B54C7-E3A1-4F68-8DB3-8D7256F149D6&tempKey=value](https://edition2.newsobserver.com/popovers/dynamic_article_popover.aspx?artguid=0815e84a-1596-4279-9f60-84648fc216f2&appcode=OBSERV&eguid=d158069b-58f5-4803-a670-a90da4c308b6&pnum=15#?deviceId=3C5B54C7-E3A1-4F68-8DB3-8D7256F149D6&tempKey=value)

Sellers who started the Sitzer-Burnett case:

[https://www.nytimes.com/2024/03/27/realestate/national-association-realtors-lawsuit-homeowners.html?unlocked\\_article\\_code=1.gE0.cylw.HJH95SrthHNN&smid=nytcore-ios-share&referringSource=articleShare&ugrp=u](https://www.nytimes.com/2024/03/27/realestate/national-association-realtors-lawsuit-homeowners.html?unlocked_article_code=1.gE0.cylw.HJH95SrthHNN&smid=nytcore-ios-share&referringSource=articleShare&ugrp=u)

First time buyers?

[https://www.nytimes.com/2024/03/25/realestate/first-time-home-buyers-nar-commission.html?unlocked\\_article\\_code=1.fk0.3ABn.JrAu4M6-jM2H&smid=nytcore-ios-share&referringSource=articleShare&ugrp=u](https://www.nytimes.com/2024/03/25/realestate/first-time-home-buyers-nar-commission.html?unlocked_article_code=1.fk0.3ABn.JrAu4M6-jM2H&smid=nytcore-ios-share&referringSource=articleShare&ugrp=u)

[https://www.washingtonpost.com/opinions/2024/03/20/settlement-realtors-commission-six-percent/?utm\\_campaign=wp\\_todays\\_headlines&utm\\_medium=email&utm\\_source=newsletter&wpisrc=nl\\_headlines&carta-url=https%3A%2F%2Fs2.washingtonpost.com%2Fcar-ln-tr%2F3d2456a%2F65fc0564d48337199faa51a3%2F64ea813471df6231b0b78abe%2F19%2F57%2F65fc0564d48337199faa51a3](https://www.washingtonpost.com/opinions/2024/03/20/settlement-realtors-commission-six-percent/?utm_campaign=wp_todays_headlines&utm_medium=email&utm_source=newsletter&wpisrc=nl_headlines&carta-url=https%3A%2F%2Fs2.washingtonpost.com%2Fcar-ln-tr%2F3d2456a%2F65fc0564d48337199faa51a3%2F64ea813471df6231b0b78abe%2F19%2F57%2F65fc0564d48337199faa51a3)

What about sellers?

<https://realestate.usnews.com/real-estate/articles/what-the-2-billion-realtor-lawsuit-means-for-homebuyers-and-sellers>

### Other litigation

Several commissions lawsuits have been working their way through the courts for years. But in the aftermath of the Sitzer/Burnett verdict, the floodgates opened, with attorneys, home sellers and homebuyers piling on new and "copycat" lawsuits attacking the current compensation structure.

#### **Gibson**

Case overview: An antitrust case nearly identical to Sitzer/Burnett, but with a broader reach and new defendants.

Status: Filed by the lead attorney for the Sitzer/Burnett plaintiffs on Oct. 31 in Missouri immediately following the Sitzer/Burnett verdict.

Defendants: NAR, Compass, eXp, Redfin, Weichert Realtors, United Real Estate, Douglas Elliman and Berkshire Hathaway Energy.

Venue: U.S. Western District Court in Missouri.

What's next: Defendants have until early 2024 to respond to the complaint. This case has the potential to have nationwide implications, involving every home seller that used the services of the defendants in the past four years. It's just getting started, however, so it may be some time before there's a ruling on whether it should go to trial.

On Dec. 27, NAR attorneys filed a motion requesting a delay in this case until post-trial motions or its appeal of the Sitzer/Burnett case are resolved. That motion was denied by Judge Stephen Bough on Jan. 17.

Also on Jan. 17, the plaintiffs filed a document voluntarily dismissing Howard Hanna Real Estate Services from the case without prejudice. The filing did not explain the dismissal.

### **Moehrl**

Case overview: Another class action antitrust case naming the same defendants as those in Sitzer/Burnett. MLS regions from across the country are involved, and the plaintiffs are seeking more than \$13 billion in damages.

Status: The case was certified as a class action in March 2023. A trial date is expected to be scheduled for some time next year; the next status report is scheduled for Jan. 22.

Defendants: NAR and HomeServices of America. Former defendants RE/MAX, Anywhere Real Estate and — as of Feb. 1, 2024, Keller Williams — have already reached a settlement. 20 MLSs are also named as co-conspirators.

Venue: U.S. District Court in Northern Illinois.

What's next: First filed in March 2019, a month before Sitzer/Burnett, this case was expected to set the tone for the compensation lawsuits. Sitzer/Burnett went to trial first, however, and the verdict in that case will likely influence the direction of Moehrl.

On Dec. 19, the three remaining defendants asked the court for a summary judgment, stating that the plaintiffs haven't proven their case after years of litigation. U.S. Judge Andrea Wood is reviewing the motions.

### **Leeder/Batton 1**

Case overview: A different take on the buyer-broker compensation cases: Homebuyers, not sellers, are the plaintiffs who are alleging a conspiracy to keep commissions inflated.

Status: The case was filed in 2021 and dismissed in May 2022, but an amended complaint was subsequently filed. In dismissing the original case, the court ruled that homebuyers were "indirect purchasers" of commission fees, so antitrust law wouldn't apply. On Feb. 20, 2024, Judge Andrea Wood dismissed HomeServices of America as a defendant and cut the number of claims.

Defendants: NAR, Keller Williams, RE/MAX and Anywhere Real Estate.

Venue: U.S. District Court in Northern Illinois.

What's next: The case will move forward without HSoA and focus on homebuyer damages being pursued under the antitrust or consumer protection laws of multiple states.

## **Batton 2**

Case overview: This case is similar to Batton 1 but names a different set of defendants.

Status: The case was filed on Nov. 2. On Jan. 10, an unopposed motion was made by the plaintiffs to transfer this case to Judge Andrea Wood, who is also handling Batton 1.

Defendants: Compass, eXp, Redfin, Weichert Realtors, United Real Estate and Douglas Elliman Inc.

Howard Hanna was dismissed as a defendant on March 4.

Venue: U.S. District Court in Northern Illinois.

## **Nosalek**

Case overview: A buyer-broker commission case brought by home sellers in Massachusetts. Unlike Sitzer/Burnett and Moehrl, this case does not name the National Association of Realtors but claims that the policies of Massachusetts-based MLS PIN mirror those of NAR.

Case status: No trial or mediation date has been set, as the case is now on hold until the U.S. Judicial Panel on Multidistrict Litigation decides about consolidating the case with other lawsuits. The panel will hear oral arguments on March 28. Several defendants — MLS PIN, RE/MAX, Keller Williams and Anywhere — have reached settlements. The remaining defendant, HomeServices of America, has requested a summary judgment.

On Feb. 15, the Department of Justice filed a statement of interest document in the case, indicating that the MLS PIN settlement doesn't go far enough and suggesting there should be an injunction that would prohibit sellers from making commission offers to buyer brokers.

Plaintiffs: Jennifer Nosalek is the leading class representative for home sellers in the MLS PIN region.

Defendants: Keller Williams and HomeServices of America are the remaining defendants after MLS PIN agreed to settle over the summer (approval is pending), and Anywhere and RE/MAX reached an agreement through the Sitzer/Burnett and Moehrl settlement.

Venue: U.S. District Court in Massachusetts.

What's next: The MLS PIN settlement, which has attracted the interest of the Department of Justice, is expected to have a final approval hearing next spring.

Even with an updated settlement plan, the DOJ continues to express concerns about the settlement. On Dec. 18, they asked the court if they could have until Feb. 15 to submit additional statement of interest documents, and the judge approved the request. That could further delay the final approval hearing.

The RE/MAX and Anywhere settlements are also pending final approval, with a hearing scheduled in the spring.

During a Dec. 6 hearing for a summary judgment motion, Judge Patti Saris took the arguments under advisement but didn't immediately make a ruling.

## **Burton**

Case overview: A lawsuit similar to Sitzer/Burnett, but with a smaller pool of defendants, brought by a home seller in South Carolina.

Case status: Filed Nov. 8, this case is seeking class action status to include home sellers throughout South Carolina.

Defendants: NAR and Keller Williams.

Venue: U.S. District Court in South Carolina's Spartanburg division.

### **March**

Case overview: An antitrust case brought by a New York home seller centered on real estate transactions in Manhattan, which is served by the Real Estate Board of New York (REBNY).

Status: Filed Nov. 8 with a request for class action status and a jury trial.

Defendants: More than two dozen, including REBNY, Christie's International Real Estate, Coldwell Banker, Sotheby's International Realty, Douglas Elliman, RE/MAX, Keller Williams NYC, Compass, SERHANT and others.

Venue: U.S. District Court, Southern District of New York.

### **QJ Team**

Case overview: Centered in Texas, this suit was brought by a Texas home builder and a holding company. It focuses on local associations and brokerages, alleging not only antitrust violations but in some cases, violations of the Texas Deceptive Trade Protections Act.

Status: Filed Nov. 13, the plaintiffs are seeking class action status for Texas home sellers who sold a home in the past four years.

Defendants: Named defendants include the Texas Association of Realtors, MetroTex Association of Realtors, Houston Association of Realtors, Austin Board of Realtors, San Antonio Board of Realtors, more than 20 Texas teams or brokerages, and individual broker Mark Anthony Dimas. NAR is not named as a defendant although it is referred to as the "creator of the conspiracy."

Venue: U.S. District Court, Eastern District of Texas Sherman Division.

### **Phillips**

Case overview: The case is remarkably similar to the other buyer agent commission lawsuits alleging a conspiracy to keep commission fees inflated and would apply to home sellers in Georgia.

Status: Filed Nov. 22, the plaintiffs have requested class action status to include home sellers who listed and sold properties on a Georgia MLS in the past four years. An amended complaint, filed Dec. 6, added a number of new defendants and three additional plaintiffs.

Defendants: A whopping 40 named defendants in total. The initial filing listed 24 defendants, including NAR, several local firms, and national brokerage companies HomeServices of America, Keller Williams, RE/MAX, Compass, Anywhere, Coldwell Banker, Century 21, Engel & Völkers, Christie's International Real Estate and Sotheby's International Realty. Defendants added to the case on Dec. 6 include Redfin, eXp, ERA and multiple local brokerages.

Venue: U.S. District Court, Northern District of Georgia Atlanta division.

### **Spring Way/Kay**

Case overview: Similar to other buyer agent commission lawsuits, home sellers allege a conspiracy to keep commission fees inflated through buyer agent commission rules. This case involves the West Penn MLS and several brokerages that use the MLS.

This is not the first time West Penn MLS was named a defendant in antitrust litigation. In 2009, it settled a case involving rules that the Federal Trade Commission said effectively barred brokers who offered flat-rate fees, and in 2011, settled an antitrust case brought by home sellers, paying \$2.38 million in damages.

Status: Filed Dec. 4, the plaintiffs have requested class action status to include home sellers who listed properties on a West Penn MLS in the past four years.

On Jan. 26, both the plaintiffs and the defendants in the case were changed to reflect an earlier settlement made by Anywhere.

As of the Jan. 26 filing, Spring Way and Wehrein were removed, as both sold homes using Anywhere-affiliated brokerages. Danielle and Jessie Kay, who sold a home in 2021 using a Realty ONE affiliate, are the new lead plaintiffs.

Defendants: Following the Jan. 26 filing, the defendants are: West Penn MLS, Berkshire Hathaway HomeServices The Preferred Realty, NextHome PPM Realty, Realty ONE Group Gold Standard, Realty ONE Group Platinum, Realty ONE Group Horizon and six new additions: Howard Hanna, River Point Realty, Bovard-Anderson Co, Priority Realty, Rubinoff Realty and Found It PA.

Coldwell Banker Realty and Piatt Sotheby's International Realty — both of which are part of Anywhere — were named in the original filing but are no longer defendants.

Venue: U.S. District Court for the Western District of Pennsylvania.

### **Parker**

Case overview: A buyer agent commission lawsuit based in Florida. Unlike most of the other cases, which were filed in U.S. District Court, this complaint was filed in a state Circuit Court.

Status: Filed Dec. 4, the plaintiffs have requested class action status to include home sellers who listed properties on a Florida MLS in the past four years.

Defendants: The Florida Association of Realtors, which is the largest statewide real estate association in the U.S. with more than 223,000 members, and 16 of the largest real estate brokerages in the state have been named. Those brokerage defendants include United Realty Group, Florida Realty of Miami and The Keyes Company.

Venue: 11th Judicial Circuit Court in Miami-Dade County.

Case overview: Brokerages, associations and an MLS serving the San Francisco Bay Area are the target of this class action buyer commissions lawsuit.

The court documents highlight rules set forth by BAREIS MLS, a defendant in the case, noting that MLS members "were obligated to and did adopt, implement, and enforce anticompetitive restraints," specifically rules requiring home sellers "to make a blanket, unilateral and non-negotiable offer of buyer broker compensation."

Status: Filed Dec. 8, the plaintiffs have requested class action status to include home sellers who listed properties on the BAREIS MLS in the past four years.

Defendants: National Association of Realtors, Anywhere Real Estate, RE/MAX, Keller Williams, Compass, eXp, the Bay Area Real Estate Information Services, Marin Association of Realtors, North Bay Association of Realtors, Northern Solano County Association of Realtors and Solano Association of Realtors.

On Jan. 12, an amended complaint named five additional defendants: Windermere Real Estate, Vanguard Properties Inc., Rapisarda & Fox Inc., Twin Oaks Real Estate Inc. and Realty One Group.

Venue: U.S. District Court, Northern District of California's San Francisco Division.

## **Martin**

Case overview: This is the second major buyer agent commissions case in Texas and was filed on Dec. 14. Much like the earlier QJ Team case, this involves local associations and brokerages, with the home sellers alleging not only antitrust violations but, in some cases, violations of the Texas Deceptive Trade Protections Act.

Status: The plaintiffs have requested class action status to include all home sellers who used any defendant as the listing broker for the sale of a home on a multiple listing service and paid a commission to the buyer's broker over the past four years. Keller Williams is an exception — because they are part of the Moehrl case, which covers home sales in 2019-2020, the new filing would apply to sales brokered by KW in Texas that occurred the last two years.

Defendants: More than 40, including the Texas Association of Realtors, Austin Board of Realtors, San Antonio Board of Realtors, Keller Williams and HomeServices of America. The National Association of Realtors, Anywhere Real Estate and RE/MAX are named as co-conspirators.

Venue: U.S. District Court's Eastern District of Texas

## **Umpa**

Case overview: This is the second nationwide class action lawsuit filed in the Western District of Missouri since the Sitzer/Burnett verdict, following the Gibson filing on Oct. 31.

Along with the new complaint, lawyers in the Umpa and Gibson cases filed a separate brief with the U.S. Judicial Panel on Multidistrict Litigation requesting that the two cases be consolidated with seven other copycat lawsuits filed in different districts and be tried in the U.S. Western District of Missouri before Judge Stephen Bough, who oversaw the Sitzer/Burnett trial.

The Umpa case, filed Dec. 27, is similar to many of the other antitrust filings from home sellers.

Status: The plaintiffs have requested class action status to include all home sellers who used any defendant as the listing broker for the sale of a home on a multiple listing service.

Defendants: The National Association of Realtors and more than a dozen major brokerages are named as defendants. The brokerages are: HomeServices of America, Keller Williams, Compass, eXp, Redfin, Weichert Realtors, United Real Estate, Howard Hanna, Douglas Elliman, At World, The Real Brokerage, Realty One Group and HomeSmart.

Several local realtor associations and MLSs are listed as co-conspirators.

Venue: U.S. Western District of Missouri.

## **Friedman**

Case overview: Filed on Dec. 29, this case focuses on "a horizontal antitrust conspiracy among major residential real estate firms not to compete over broker commissions in Brooklyn's most expensive neighborhoods," the court documents stated.

Status: On Jan. 18, home seller Robert Friedman filed a document voluntarily dismissing the case, which was approved by Judge Frederic Block on Jan. 19. Each party will bear its own attorneys' fees and costs.

This was the second New York City-based commissions case naming REBNY. The March suit, filed in November, focuses on home sales in Manhattan.

Plaintiff: Robert Friedman, home seller.

Defendants: Real Estate Board of New York, Douglas Elliman, Christie's International Real Estate, The Corcoran Group, Sotheby's International Realty Affiliates, Brown Harris Stevens, Serhant, Compass, Nest Seekers, The Agency, Elegran, Engel & Volkers New York Real Estate, R New York, Anywhere Real Estate, Terra Holdings, and Leslie J. Garfield & Co.

Venue: U.S. District Court's Eastern District of New York.

### **Tuccori**

Case overview: The case was brought by a homebuyer alleging a conspiracy to inflate commissions fees.

Status: Originally filed in the Cook County Illinois Circuit Court in December 2023, the case was moved over to U.S. District Court on Jan. 5.

The plaintiff's attorneys are requesting class action status to include anyone who, since March 2000, purchased a home listed on a NAR-affiliated MLS and used an At World buyer or seller agent.

Defendant: At World Properties

Venue: U.S. District Court's Northern District of Illinois.

### **Masiello**

Case overview: A home seller in Arizona is suing a laundry list of nearly 20 local associations and brokerage companies.

Status: The case was filed on Jan. 5, and the plaintiff has requested class action status to include anyone who used one of the defendants to list and sell a home on an Arizona MLS over the past four years.

Defendants: Arizona Association of Realtors, Phoenix Association of Realtors, Scottsdale Area Association of Realtors, West and Southeast Realtors of the Valley, Tucson Association of Realtors, My Home Group, HomeSmart, Realty One Group Arizona, Realty Executives, Christie's International Real Estate, West USA Realty, Hague Partners Holdings, Arizona Best Real Estate, North & Co., Silverleaf Realty, The Brokery, Long Realty, Tierra Antigua Realty.

Walt Danley Local Luxury was originally named as a defendant but dropped from the case on Feb. 5.

Venue: U.S. District Court's District of Arizona.

### **Whaley**

Case overview: A home seller in the Las Vegas area is suing eight real estate associations and MLSs, including NAR, along with 15 brokerage firms.

Status: The case was filed on Jan. 15, and the plaintiff has requested class action status to include anyone who used one of the defendants to list and sell a home on a Nevada MLS over the past six years.

An amended complaint filed on Jan. 25 named an additional 15 defendants, all brokerage firms doing business in Nevada.

Defendants: National Association of Realtors, Las Vegas Realtors, Nevada Realtors, Sierra Nevada Realtors, Incline Village Realtors, Elko County Realtors, Mesquite Real Estate Association, the Northern Nevada Regional MLS, Jason Mitchell Group, eXp, Berkshire Hathaway HomeServices Nevada Properties, Simply Vegas, Urban Nest Realty, Luxury Homes of Las Vegas, Huntington and Ellis, Keller Williams Southern Nevada, Keller Williams VIP, Keller Williams Realty Las Vegas, Keller Williams Realty The Marketplace, Engel & Völkers Lake Tahoe, Douglas Elliman of Nevada, and Redfin.

Opendoor was dismissed as a defendant in the case on March 6.

Venue: U.S. District Court's District of Nevada.

### **Latham**

Case overview: A Sacramento-based LLC is suing 19 real estate entities including national and local brokerages and 10 Northern California associations and MLSs.

Status: The case was filed on Jan. 18, and the plaintiff has requested class action status to include anyone who used one of the defendants to list and sell a home on MetroList over the past four years.

Plaintiff: Willsim Latham LLC. According to court documents, the LLC sold a home in 2021 that was listed on MetroList MLS, the second-largest MLS in California. The seller paid combined commission fees of \$40,500, of which \$22,500 went to the buyer agent.

Defendants: MetroList Services, Sacramento Association of Realtors, Placer County Association of Realtors, El Dorado County Association of Realtors, Lodi Association of Realtors, Yolo County Association of Realtors, Central Valley Association of Realtors, Amador County Association of Realtors, Nevada County Association of Realtors, Sutter-Yuba Association of Realtors, RE/MAX, Anywhere Real Estate, Keller Williams Realty, eXp, Norcal Gold, Century 21 Select Real Estate, William L. Lyon & Associates, Paul M. Zagaris Inc. and Guide Real Estate Inc.

The National Association of Realtors is listed as a co-conspirator.

Venue: U.S. District Court's District Eastern District of California.

Case overview: Home sellers in Southern California are suing 35 brokerages, MLSs and associations for alleged collusion to keep commission fees inflated.

Status: The case was filed on Jan. 17 and involves five Southern and Central California counties: Madera, Fresno, Merced, Mariposa and Los Angeles. The plaintiffs have requested class action status to include anyone who used one of the defendants to list and sell a home on an MLS in those counties for the past four years.

Defendants: Nearly three dozen defendants are named in the lawsuit.

The brokerage defendants include national and local firms: The Agency, eXp World Holdings and four local eXp firms, Compass, Berkshire Hathaway and its affiliates, First Team Real Estate Orange County, Rodeo Realty and Pinnacle Estate Properties.

MLS and association defendants are: The National Association of Realtors, CRMLS, Combined LA/Westside MLS, California Association of Realtors, Greater Los Angeles Realtors, Citrus Valley Association of Realtors, Glendale Association of Realtors, Inglewood Board of Realtors, Montebello District Association of Realtors, Palos Verdes Peninsula Association of Realtors, Pasadena-Foothills Association of Realtors, Rancho Southeast Realtors, South Bay Association of Realtors, Southland Regional Association of Realtors, Tri-Counties Association of Realtors, West San Gabriel Valley Realtors, Malibu Association of Realtors, Southwest Los Angeles Association of Realtors, Madera Association of Realtors, Fresno Board of Realtors, Merced County Association of Realtors and Mariposa County Board of Realtors.

Venue: U.S. District Court's District Central District of California.

### **Jensen**

Case overview: A Utah home seller filed a complaint after paying a 6% commission split between the buyer agent and his listing agent in the Salt Lake City area in October 2022.

Status: The class action case was filed Feb. 9, with the class encompassing any person who paid a buyer agent commission and used one of the defendants to sell a house over the past four years through the

Wasatch Front MLS (UtahRealEstate.com), Washington County MLS, Iron County MLS or Summit County MLS.

Defendants: National Association of Realtors, Anywhere Real Estate, HomeServices of America and affiliated companies HSF Affiliates and BHH Affiliates, RE/MAX, Keller Williams, Keller Williams of Salt Lake, KW St. George, KW Westfield, Equity Real Estate, Century 21 Everest, Realtypath LLC and Windermere Real Estate.

Venue: U.S. District Court of Utah

Case overview: A second copycat case was filed in Nevada on Feb. 16. It involves a home seller who sold a home in 2022 for \$525,000 and paid 5% in total commission fees. A previous suit was filed in Nevada on Jan. 15 and names several of the same defendants.

Defendants: National Association of Realtors, The Agency, Chase International Inc., Dickson Realty, Compass, eXp World Holdings, The Real Estate Guy, BHH Affiliates, Douglas Elliman, Homesmart International, Huntington & Ellis, Realty One, Redfin, Urban Nest Realty, Nevada Realtors, Greater Las Vegas Association of Realtors, Northern Nevada Regional MLS, Mesquite Real Estate Association.

Venue: U.S. District Court of Nevada.

### **Freedlund**

Case overview: This Southern California case blasts buyer agents, portraying them as nearly worthless and asserting that a competitive buyer agent commission rate should be zero. The case also alleges, like many others, that the current system does not allow for competition.

Status: The suit was filed Feb. 26 and is proposed as a class action on behalf of all California sellers who paid a buyer's commission to or through a Redfin agent from Oct. 2, 2019, to October 2, 2023. That's the date Redfin announced it was cutting ties with NAR.

Defendants: Redfin, NAR and California Association of Realtors.

Venue: U.S. District Court for California's Central District.

### **Maslanka**

Case overview: This lawsuit differs slightly from the other copycat cases in that it includes both buyers and sellers and was filed in circuit court. Most of the major lawsuits have been filed in district court on behalf of home sellers only.

Status: The case was filed on Feb. 22 as a class action covering both buyers and sellers in the state of Illinois.

Defendant: Baird & Warner.

Venue: U.S. Circuit Court of Cook County, Illinois.

### **Consolidation**

Details: The U.S. Judicial Panel on Multidistrict Litigation is taking up a motion about consolidating many of these copycat lawsuits into a single mega-case and assigning it to one judge.

The original motion, filed Dec. 27 by Sitzer/Burnett lead attorney Michael Ketchmark, asked for nine cases to be consolidated into one and held in the U.S. District Court in Missouri. In January, a tenth case, known as Latham, was added.

On Jan. 23, the National Association of Realtors countered with its own motion: Consolidate 19 cases into one and hold the case in the U.S. District Court of Northern Illinois or the U.S. District Court in Eastern Texas. Several cases have already been filed in Illinois, while Texas is home to the largest number of defendants.

Status: The panel is scheduled to hear oral arguments on March 28 in Charleston, South Carolina.

Venue: U.S. Judicial Panel on Multidistrict Litigation in Washington, D.C.

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Additional notes

### **IMPACT ON NAR**

NAR considered a range of legal options throughout the litigation process, including reaching a settlement or continuing to appeal the Sitzer-Burnett verdict and litigate the related copycat cases.

The latter could have forced the association to file for Chapter 11 bankruptcy protection, leaving members, associations, MLSs and brokerages exposed.

According to NAR's website, "The settlement agreement also mandates two key changes to the way members and MLS participants do business."

NAR agreed to create a new MLS rule prohibiting offers of compensation on the MLS. This would mean that offers of compensation could not be communicated via an MLS, but they could continue to be an option consumers could pursue off-MLS through negotiation and consultation with real estate professionals.

NAR also agreed to create a new rule requiring MLS participants working with buyers to enter into written agreements with their buyers before the buyer tours a home. NAR has long encouraged its members to use written agreements to help consumers understand exactly what services and value they provide, and for how much.

NAR continues to deny any wrongdoing and maintains that cooperative compensation is in the best interest of consumers. NAR members can use these changes as an opportunity to explain their clients' options. Both changes would go into effect in mid-July under the terms of the proposed settlement.

NAR is also facing an existential crisis: its leadership has been involved in several scandals in the last year and it now faces competition from rival real estate associations.

### **IMPACT ON BUYERS**

Though the media suggests that the NAR settlement will be good for buyers, the press has not considered the following:

- Most buyers cannot afford a down payment, much less buyer broker fees.
- Sales prices, particularly in a seller's market, will not create more affordable housing nor will the settlement lead to lower prices.
- Most lenders do not permit buyers to finance the cost of representation. .

- VA doesn't permit buyers to compensate their brokers. (NAR is seeking a rule change.)

## **IMPACT ON SELLERS**

Contrary to press reports, it is still unlikely that the total sellers will pay for professional fees will decrease. Listing agents will charge what the market will bear. Buyer agents will ask sellers to pay their fees as well. Sellers are unlikely to net more.

What will change for the positive is that sellers will learn more about brokerage fees, including their negotiability.



### **THE AUTHOR**

Deborah H. Long is a licensed real estate instructor in North Carolina. She completed her doctorate in educational leadership in 1994. Her research on the effect of ethics instruction on the ethical reasoning of real estate brokers received national media and industry attention. She has three other college degrees. She has been a teacher for more than 50 years.

In addition to holding a GRI (Graduate Realtor Institute), CDEI (Certified Distance Education Instructor) and CRS (Certified Residential Specialist) designations, Deborah earned the DREI (Distinguished Real Estate Instructor), the most prestigious designation for excellence in teaching offered by the Real Estate Educators Association.

She is the award-winning author of many articles and education programs as well as 18 real estate textbooks. Her real estate ethics program for educators has received the "Best Single Education Program" award from the Real Estate Educators Association and from the NC Real Estate Educators. The North Carolina Real Estate Educators Association recognized Deborah as "Educator of the Year." She was also the editor of the prestigious REEA Journal for 10 years.

Deborah's real estate ethics research has been featured in the Wall Street Journal and on numerous radio talk shows. Her research has led her to write *Doing the Right Thing: A Real Estate Practitioner's Guide to Ethical Decision Making*, now available in its 4th edition.

She has been a proponent of online education since it became available and has taught numerous educators about technology. She earned the prestigious Certified Distance Education Instructor designation from ARELLO (Association of Real Estate License Law Officials).

Deborah was named Tar Heel of the Week in 2017 for her contributions to the community. Debbie can be reached at [DebbieTheTeacher@gmail.com](mailto:DebbieTheTeacher@gmail.com).

She expects this course to be revised multiple times during 2024 and 2025.

