



Consumer Federation of America

REAL ESTATE BROKERAGE CLASS ACTION LAWSUITS: HOW TO EFFECTIVELY SEPARATE (“DECOUPLE”) LISTING AND BUYER BROKER COMMISSIONS

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Earlier this month, two of the nation’s largest real estate companies, Anywhere and RE/MAX, agreed to resolve claims against it from two class action lawsuits – Sitzer/Burnett v. National Association of Realtors (NAR) et al. and Moehrl v. NAR et al. This antitrust litigation challenged the industry requirement that brokers participating in NAR-related multiple listing services, offer compensation to buyer brokers in their property listings. The compensation is paid by the seller clients of these listing brokers.

Anywhere (formerly Realogy) agreed to provide a \$83.5 million settlement and, according to a plaintiff’s attorney, to make “significant changes to [company] practices relating to the conduct we have challenged.”ⁱ RE/MAX agreed to a \$55 million settlement and also “certain changes to its business practices,” according to its communication with the U.S. Securities and Exchange Commission.

Anywhere – which includes brands such as Century 21, Coldwell Banker, ERA, Sotheby’s, and Better Homes & Gardens – is the nation’s largest residential real estate company, with 15 percent of total existing home sales volume (in 2020). Some expect that other large companies being sued, including Keller Williams and Home Services, will also settle before or just after the October 16 date set for the Sitzer/Burnett trial. That would leave NAR to deal with the plaintiff’s contention that NAR rules violate antitrust law and call for injunctive relief.ⁱⁱ

What’s At Stake

The litigation seeks to separate (“decouple” or “untie”) compensation received by listing brokers and by buyer brokers. Today, listing brokers are required by NAR rules to list seller compensation offered to buyer brokers in their MLS listings. Plaintiffs claim that this requirement effectively sets buyer agent compensation at a high and uniform level. In research on home sales in 35 cities, CFA has documented the uniformity of this compensation, which typically is either 2.5 or 3.0 percent of the sale price.ⁱⁱⁱ

The extent that Anywhere, RE/MAX, and other defendants are required to change practices could have a significant impact on broker compensation that has effectively been set by the industry (typically at 5-6 percent of the sale price), not by marketplace competition. CFA has estimated that in a price competitive residential real estate marketplace (that peaked at around \$100 billion two years ago) consumers would save 20-30 percent in lower commissions.

CFA, however, has also emphasized that significant savings to consumers will not be realized unless the industry is effectively restructured to promote price competition. Listing agents will continue to inform sellers that it is normal practice for them to compensate buyer agents, and if sellers choose not to do so or reduce the expected rate, their listing will be less likely to be shown. Buyer brokers will continue to inform their buyer clients that, typically, sellers provide their compensation with the implication that there is no cost to the buyers.

The litigation also seeks damages. The two recent settlements suggest that these will be affordable and perhaps, if all defendants settle, be in the neighborhood of \$400-\$500 million total.

Effective Restructuring

CFA has suggested that the easiest and most effective way to achieve this competition is to modify federal mortgage regulations to allow buyers to finance buyer agent commissions. Since these commissions are (according to wide consensus) added to the sale price, the modification would not increase overall buyer expenses (or mortgage loan amounts) while allowing buyers to negotiate down buyer commissions. Buyer brokers would no longer be compensated by sellers but by their own buyer clients.^{iv}

The industry, however, has strongly opposed this measure in an effort to preserve seller payment of buyer agent commissions. How this seller compensation is restructured would strongly influence any increase in price competition. Most importantly:

- Sellers must believe that they are not obligated to pay buyer broker commissions.
- Buyers must believe that they can negotiate their agent's compensation.

For these two conditions to obtain, the following structural changes are necessary though possibly not sufficient at least in the near-term:

- Before any a property search, buyers and their agents must agree on agent compensation. This agreement must be written and approved by both parties.
- Sellers and their listing agents should not be required to offer compensation to buyer brokers on MLS property listings. Sellers, not listing agents, should decide and make any payments (“concessions”) to buyers, not to their buyer agents, to help buyers compensate these agents.

- Buyer brokers should not receive any payment from sellers in excess of the commission negotiated by buyers and their agents. Without this prohibition, after negotiating their compensation with clients, buyer brokers could seek additional compensation from sellers. In a buyer's market, sellers would be under some pressure to provide this compensation.

Ineffective Restructuring

The industry appears to be willing to accept some positive changes in MLS rules, most importantly, that listing agents no longer be required to provide mandatory compensation offers to buyer brokers. This is the key structural change that is part of the recent settlement in a lawsuit (Nosalek v. MLS PIN) against a New England multiple listing service independent of NAR. It is also the most important change adopted by the Northwest MLS, which serves most of Washington State and is also independent of NAR.

This partial restructuring by the Northwest MLS, however, appears to have had little material effect on actual industry practices. Almost all listing agents offer compensation to buyer brokers, and this compensation is remarkably uniform. In our recent survey of offered rates on 733 listings in seven communities served by the Northwest MLS, we found that (1) almost all listings (731 of 733) included compensation offers and (2) these offers were as uniform as they were before the reforms. Among the 733 listings, 84.2 percent included rate offers of 2.5 or 3.0 percent. Excluding one community (Vancouver) where the typical rate was 2.25 percent, 93.0 percent of the rate offers were either 2.5 or 3.0 percent. Rate uniformity in Seattle was even slightly greater than that found in an earlier pre-reform survey – 93.9 percent now compared to 91.7 percent then.

An important missing element in Northwest MLS reforms is that buyer brokers using that MLS be required to reach agreement with clients about compensation before facilitating any property searches. How these changes are characterized by agents in their communications with clients will have a strong influence over price competition.

With Restructuring, Price Competition Would Take Time to Emerge

CFA believes that even with effective structural changes, price competition and lower rates would take time to emerge. Listing and buyer brokers would continue to resist price negotiation while seeking to preserve 5-6 percent commissions. In an industry dependent on broker cooperation where most agents work with both sellers and buyers, there is much incentive and opportunity to persuade clients to agree to existing arrangements.

Over time, though, more sellers and buyers would likely discuss commissions with their agents, often seeking to negotiate lower levels. Discounters listing properties would be under less pressure to offer buyer brokers today's expected commission rates while buyer brokers could lower their commissions without having to provide rebates, which are still illegal in nine states. How much time this takes would depend to a large extent on consumer awareness and the willingness of both buyers and sellers to negotiate commissions. Effective consumer education would speed the process.

As price competition increased, there would be increasing differentiation of buyer agent rates charged depending on agent experience and competence. New and marginal agents would find it more difficult to charge the same rates as competent full-time agents with many years experience. Increasingly, as in other price competitive markets, quality of service and the price of this services would be become aligned.

ⁱ These changes to company practices, according to a plaintiff's attorney, will be revealed after the plaintiffs file a motion for approval.

ⁱⁱ The Moehrle lawsuit is scheduled for trial early in 2024.

ⁱⁱⁱ Stephen Brobeck, Real Estate Commission Rates in 35 Cities: Uniformity and Variability (Consumer Federation of America, April 2022).

^{iv} This restructured financing would also help preserve buyer brokerage. Many in the industry have predicted that rate uncoupling would threaten the existence of buyer brokers because, having to pay these brokers, many more buyers would bypass them by contacting listing brokers directly. However, it appears that, if the buyer broker compensation were no longer added to sale prices, including this compensation in mortgage financing would likely become routine and uncontroversial. The current seller financing of buyer broker commissions appears to be far more unreasonable and controversial.