Research

Antitrust Lawsuits Seek to Bust Realtor Broker Fees Scheme

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Executive Summary

- Two class action lawsuits filed against the National Association of Realtors (NAR) and four major real estate broker franchisors allege a conspiracy involving commission-sharing practices that leave sellers paying commissions to both the selling and buying brokers.
- The lawsuits claim that tying NAR rules with access to a Multiple Listing Service, a database of home listings operated by local NAR associations, limited competition and artificially inflated commission rates in violation of federal and state antitrust laws.
- This research estimates that a competitive market for commission rates could have saved sellers an estimated $72 billion in 2022, which, in turn, could have been reflected in lower home prices.

Introduction

Two class action lawsuits claim the National Association of Realtors (NAR) and four real estate brokerage franchisors, Realogy Holdings (now called Anywhere Real Estate), HomeServices of America, RE/MAX, and Keller Williams Realty conspired to require home sellers to pay the buyer's broker commission at an inflated amount in violation of federal and state antitrust laws. The Department of Justice (DOJ) is considering its own lawsuit following a multi-year investigation.

The alleged conspiracy surrounds an NAR rule requiring all selling brokers to make a blanket, non-negotiable offer of a buyer broker commission rate when listing a property on a Multiple Listing Service (MLS) platform, a database of homes for sale operated by a local NAR association. Tying this rule to accessing an MLS acts as a form of price fixing by stifling competition for commission rates keeping them artificially high, the plaintiffs claim. Typically, sellers pay commission rates of 5–6 percent to be split between the selling and buying broker.

The current commission model burdens home sellers with a cost that would otherwise be paid for by the home buyer in a competitive market. Untying the NAR rule from access to MLS would facilitate a market in which home buyers directly negotiate commission rates paid to their broker and put downward pressure on commission rates. This research estimates that a competitive market could have saved consumers $72 billion in commissions paid in 2022, which would likely translate to a reduction in home prices.

Antitrust Claims

The two class action lawsuits, Sitzer/Burnett et al. v. NAR et al. and Moehrl et al. v. NAR et al., allege that NAR and the major brokerage firms conspired to require home sellers to pay the buying broker, and that this amount was inflated. If true, the scheme would violate federal antitrust law, specifically Section 1 of the Sherman Act as well as state antitrust laws. Section 1 of the Sherman Act prohibits every contract or conspiracy in restraint of trade.

The core of the claim surrounds NAR's rule that requires all selling brokers to make a blanket, unilateral offer of buying broker compensation when listing a property on MLS, known as the Buyer Broker Commission Rule. These commission offers are made up front and irrespective of a deal's complexity, and without knowing the buying agent's level of involvement. Each MLS is controlled by a local NAR association, and to gain access, a broker must be a member of NAR and abide by NAR rules.

Ensuring the rule's compliance hinges on the relationship between NAR, the largest trade association in the United States representing over 1.5 million members, and the four brokerage firms. The brokerage firms "play an active role in NAR and mandate that franchisees, brokerages, and individual realtors join and implement NAR's anticompetitive rules, including the [Buyer Broker Commission Rule], otherwise parties would not receive the benefit of the [brokerage firms'] branding, brokerage infrastructure, and other support," according to court documents. The brokerage firms' position within NAR coupled with NAR's wide-reaching scope permits the brokers to "impose supra-competitive charges on home sellers and restrain competition by precluding competition from innovative of lower-priced alternatives." This relationship, according to claimants, gives NAR and brokerage firms market power over local real estate broker services through the control of MLS.

Two of the named brokerage defendants, RE/MAX and Realogy Holdings, agreed to settlements of $55 million and $83.5 million, respectively.

Effects of Stifling Competition

Stifled competition resulting from the relationship between NAR membership, MLS access, and the Buyer Broker Commission Rule presents itself in two ways: First, it artificially inflates commission rates that are paid wholly by the seller; second, it creates an incentive for the buying broker to steer home buyers toward homes with higher broker commission rates or fail to show homes with lower broker commission rates. The two results are self-reinforcing.

Selling agents understand they need buying agents to cooperate to successfully sell a home. The selling agent will create a listing on MLS to ensure the greatest number of buying agents know of the home's availability. Meanwhile, the Buyer Broker Commission Rule required by the NAR as part of the MLS listing incentivizes agents to artificially inflate the commission rate offered to the buying agent to garner such cooperation.

The MLS posting creates a situation of asymmetric information between the buying agent and the home buyer. Only brokers using MLS can see the unilateral offer of the commission rate to be paid to the buying broker. The home buyer does not have this information. The buying broker can then steer the home buyer toward higher commissioned homes and away from lower commissioned ones. Knowing this is likely, the seller will offer an artificially high rate of commission and complete the loop. This loop has propped up and kept commission rates stable at 5–6 percent for decades, irrespective of market ebbs and flows.

This research estimates that nearly $163 billion was paid in commission fees from the sale of existing and new homes in 2022 (shown in *Figure 1*). The average commission rate in 2022 was 5.37 percent.

Figure 1

Commission Estimate	
	2022
Existing Home Sales	5,030,000
+ New Home Sales	637,000
=Total Home Sales	5,667,000
Average Commission Rate	5.37%
Average Sales Price of Homes Sold	$535,500
Commission Value Per Home Sold	$28,756
Total Commissions Collected	**$162,962,235,450**

Opening the Market to Competition

A study conducted by Delcoure and Miller analyzed residential commission rates across several countries and found that the average rate was significantly lower than that of the United States. The United Kingdom, for example, had a commission rate of 1–2 percent. Based on their findings, they estimated that the competitive commission rate for residential brokers in the United States should be closer to 3 percent. This research finds that a commission fee of 3 percent would have saved sellers nearly $72 billion when applied to home prices and sales in 2022.

While sellers do have an opportunity to negotiate commission rates now, the current mechanism in place leaves little opportunity for successfully pushing down rates for the buying agent. A competitive market for commission rates would likely leave both the home seller and the home buyer paying their respective brokers individually, rather than the current situation in which the seller pays both. A new market would likely form where buyers directly negotiate with buying agents. Such a market could usher in new forms of payment structures untethered from the selling price of a home, including a flat fee for service or even hourly rates.

As seen in other industries, advancements in technology and other innovations push down prices. Online real estate listing platforms including Zillow and Redfin have reduced the importance of the buying agent. No longer are buying agents calling clients with a list of homes, but rather, the home buyer is using these platforms and providing buying agents with a list of properties in which they are interested. Such market forces should have been putting downward pressure on commission rates, but the current mechanism inhibits this process.

A reduction in commission rates would likely translate to lower home prices. Sellers, knowing they are responsible for both the selling and buying agents' commission, will likely include a portion of the expected commission in the asking price. A competitive market where commission rates are slashed in half would likely increase the supply of homes considered affordable to the buyer.

Conclusion

The alleged anticompetitive behavior by NAR and the four real estate brokerage firms have left home sellers paying billions of dollars in excess commission rates. This research estimates a competitive market for commission rates could have saved consumers nearly $72 billion in commission in 2022.

With the DOJ eyeing its own potential case, a win in court against NAR and the brokerage firms could usher in a new commission mechanism with different payment structures and buyers likely having to pay their own broker.