

Verdict Reached: NAR vs. Sitzer | Burnett commission trial. Oct 31, 2023

What happened:

A jury has found the National Association of Realtors, HomeServices of America and Keller Williams guilty of colluding to inflate or maintain high commission rates in the Sitzer/Burnett buyer broker commission lawsuit. The defendants must pay \$1.78 billion in damages. The jury reached the verdict after two weeks of testimony - jury deliberation lasted for only 2 hours and 28 minutes. The judge hasn't issued a final ruling but could order treble damages to total more than \$5.3 billion, in addition to ordering policy changes.

Notably, Anywhere settled out of court for \$83.5 million before the arguments started (Anywhere is a independently owned franchise network that includes Century 21, Coldwell Banker, Corcoran, ERA, Better Homes and Gardens Real Estate and Sotheby's) and RE/MAX, LLC settled for \$55 million. While these may be subject to court approval, they did contain agreements that outlined brokerage policy moving forward.

Additionally, the Department of Justice (DOJ) has asked the courts for a delay in approving the Massachusetts settlement reached by MLSPin in a similar suit. This leaves this case pending as well. There is a third case filed in *Moehrl v. National Association of Realtors, et al.* Since the ruling, the attorneys representing Sitzer have filed another class action suit naming NAR, EXP, Compass, Redfin, Howard Hanna and Douglas Eliman.

What we're doing:

Although it may be years before these issues are resolved in the courts, we can focus now on how to avoid continued accusations of wrong doing, knowing what we know so far. Know better, do better is our mantra. We have learned some things already that can be helpful moving forward in a consumer-friendly way. We have studied the settlements and DOJ comments, spoken at length to local, state and national legal counsel; we have consulted with lenders; we have contracted for broker and agent training programs and have in the works plans to offer an intensive Buyer Broker designation program (ABR) that will teach not only the skills and services of a fiduciary buyer's agent, but also how to create your own value statements.

We will host a lender panel and legal panel as soon as more is known, but expect that in January. As things emerge, we will begin talking in earnest about shifting market dynamics.

The contract and forms committee is meeting on Friday to reexamine the Exclusive Right to Sell Agreement to further clarify and engage the seller in the commission process. We will also be reviewing the Exclusive Right to Buy Agreement and will make any similar changes as needed.

As our REALTOR partner, you have access to the latest news, Berkshire & MAR contracts, Berkshire MLS operations, education, events, advocacy, community network, free CE classes, and support. Most importantly, we are sifting through the headlines to read the actual

information and share the facts in the most neutral and accurate way possible. It's what we do to earn your trust and help you navigate the future.

Top Recommendation:

The biggest recommendation made by all attorneys we have spoken with is to make sure your company formalizes buyer client relationships in writing. All are very used to signing listing agreements, and now is the time to ensure you are signing buyer agreements as well. A written Exclusive or non-Exclusive Right to Buy Contract that lays out *what* you expect to be paid for your services, options for *how* you can be paid, and also *why* - what services you will provide to earn that fee all help to ensure transparency as well as client understanding and consent.

12 Brokerage Policy Considerations for Today:

Based on the settlements and court decision, here are a few other important take-aways for brokers to consider when reviewing their own office policies. Most of these you're probably doing now, because it's just good business:

1. Make sure all agents understand that transparency in all dealings with all home sellers and buyers in the areas of compensation is critical.
2. Engage sellers in the decision on offers of compensation made to cooperating brokers. This can be done as part of the Exclusive Right to Sell process. NAR has said to be consistent with their rules, the listing broker needs to state on each listing the offer of compensation. This offer can be any amount including zero, we do not set minimums, maximums or "typical" fees, and compensation is fully negotiable between the parties.
3. Prohibit agents from claiming buyer agent services are free.
4. Engage buyers in the decision on accepting offers of compensation listed in the MLS or as otherwise agreed. This can be started as part of the Exclusive Right to Buy process, so buyers will then be able to use this knowledge to make informed purchase offers.
 - a. From the CURRENT Exclusive Right to Buy Agreement: *(a) Success Fee: The parties agree that a fee equal to _____% shall be due BROKER upon successful completion of this Contract or in the event that, within ____ months following the term of this Contract, BUYER or any person acting on behalf of BUYER purchases, rents or otherwise acquires an interest in real property about which BUYER becomes aware during the term of this Contract, including any extension.*

The parties agree that BROKER shall first seek compensation from the listing agent or from the seller. If obtained, such amount shall be credited to the amount of the Success Fee. If such fee cannot be obtained in whole or in part from the transaction, BUYER



agrees to pay BROKER the Success Fee at the time for closing of the transaction. The transaction agreement may consist of an accepted offer, purchase and sale agreement, option, deed, exchange agreement, lease or similar instrument. The BROKER shall be entitled to the Success Fee in the event of any default by BUYER.

Current options for cooperative compensation: (consistent with Code of Ethics 1-13 & 16-16)

- Buyer's Broker Accepts the Offer in the MLS
 - Buyer's Broker Rejects the Offer in the MLS and buyer structures the P&S to have the seller pay X% of the buyer's fees owed to the buyer broker according to their Exclusive Right to Buy Agreement.
 - Buyer's Broker Accepts the Offer in the MLS, plus the buyer structures the P&S to have the seller pay the buyer's remaining fees owed to the buyer broker according to the Exclusive Right to Buy Agreement.
 - Buyer's Broker Accepts the Offer in the MLS, plus the buyer pays any remaining fees owed to the buyer broker according to the Exclusive Right to Buy Agreement.
 - Buyer assumes responsibility for paying the buyer broker fee.
5. Be very clear that commissions are negotiable and not set by law or corporate policy. This should be communicated in listing agreements, buyer representation agreements and pre-closing disclosure documents.
 6. Be transparent in accurately disclosing your firm's compensation structure.
 7. Continue to be honest and upfront about how much your services cost – and how you expect to be paid. Seller and buyer written contracts that lay out these details is ideal.
 8. Display offers of cooperative compensation made by listing brokers and agents on your website listing displays, platforms and feeds (the MLS provides this data in your feeds for you).
 9. Do not allow filters, sorting or restrict access to MLS listings based on the compensation amount being offered. Uphold your professional obligation to show and market properties regardless of what the offer of cooperative compensation might be.
 10. Determine who within your company can set and/or negotiate commissions. Make sure all **negotiations** are consistent within the contractual obligations outlined in the Exclusive Right to Sell or Buy agreements are upheld and accurate.
 11. Ensure your agent education and consumer materials are consistent with these business practices.





12. Agents choose REALTOR membership because of the amazing benefits membership offers, not because it's mandated by brokerage policy. (check out 'What We're Doing' above for a brief list!)

We are in this together and your REALTOR association is committed to helping you navigate these legal waters and provide outstanding client and customer service to all. We take your trust in us seriously and will always endeavor to bring you accurate, timely and sound business information.

You are, as always, welcome to connect with us to share your thoughts, questions or concerns.

My best, Sandy



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Statement from NAR President Tracy Kasper:

Hi all,

I have an important litigation update. After an 11-day trial in the case of Burnett v. NAR et al, the eight-person jury in a Kansas City, Mo., federal courtroom, came back Tuesday and found NAR and other corporate defendants liable in the case. This matter is not close to being final.

We will appeal the liability finding because we stand by the fact that NAR rules serve the best interests of consumers, support market-driven pricing and advance business competition. We remain optimistic we will ultimately prevail. In the interim, we will ask the court to reduce the damages awarded by the jury. In court, NAR presented evidence that consumers are better off and business competition is able to thrive because of our rules and how well local MLS broker marketplaces function.

In fact, the NAR cooperative compensation rule for local MLS broker marketplaces ensures efficient, transparent and equitable marketplaces where sellers can sell their home for more and have their home seen by more buyers while buyers have more choices of homes and can afford representation. NAR also presented that REALTORS® are everyday working Americans who are experts at helping consumers navigate the complexities of home purchases and advocates for fair housing and wealth building for all.

NAR was formed 100 years ago because there was a need for a higher level of ethical practice. We should all be proud that REALTORS® continue to serve in that role. I know our mission to advocate for homeownership and always put our client interests first is unwavering. We recognize our legal team and outside counsel have worked tirelessly on this case. It will likely be several years before we reach a conclusion. I am grateful to our NAR staff and our 1.5 million members who work to serve their clients



every day. We have an important shared purpose for consumers, and we could not achieve that without all that each of us do. Below are some key questions people may have that you can share.

We will continue to keep you informed of any notable litigation milestones, and in the meantime, I encourage you to continue to refer to the Competition.Realtor website, which provides a comprehensive overview of and many resources for how REALTORS® and local MLS broker marketplaces benefit consumers. The need for each of us and every member to continue to express our value every day in as many ways as we can remains an imperative.

Questions Answered

In the case of Burnett v. NAR et al, on Tuesday, Oct. 31, the jury found NAR and the co-defendants liable. The plaintiffs claimed real estate commission rates are too high, buyer brokers are being paid too much and that NAR rules and corporate defendants' practices lead to set pricing.

The reality is that NAR rules prioritize consumers, support market-driven pricing and promote business competition. We stand by the fact that NAR's guidance for local MLS broker marketplaces ensures consumers get comprehensive, equitable, transparent and reliable home information and that brokerages of any size, service or pricing model get a fair shot at competing.

- **What are next steps legally and the timing?** This matter is not close to being final as we will appeal the jury's verdict, and we remain confident we will ultimately prevail. In the interim, we will ask the court to reduce the damages awarded by the jury. Due to the nature of appeals, this case likely will not be concluded for several years.
- **What will be the basis for NAR's appeal?** We can't speak to the specifics of that until we file our appeal, but we can say that we have a very strong legal basis for appeal.
- **Is there anything REALTORS®, brokers, state/local associations or MLSs need to do differently because of this verdict?** Not because of this verdict. But NAR has emphasized for many years two important things.
 - One is the use of buyer representation agreements, which maximize transparency by putting all agreements in writing to ensure clarity and understanding, as all members are obligated to do pursuant to the NAR Code of Ethics. These agreements formalize the professional working relationship with clients and detail what services consumers are entitled to and what the buyer agent expects from their client in return.
 - Second, it's also an imperative for members to continue to express that commissions are negotiable and set between brokers and their clients; explain how local MLS broker marketplaces promote equity, transparency and market-driven pricing for consumers; and persistently communicate the incredible value agents who are REALTORS® provide.





And Multiple Listing Service, Inc.

- **What does the future of buyer representation look like as a result of the verdict?** This verdict does not require a change in our rules, but if class action attorneys had it their way, buyer representation would be very much at risk because many first-time home buyers, among others, couldn't afford to pay for representation out of pocket. It's important that members take every opportunity to express how they are experts who guide consumers through the financial, legal and community complexities of buying or selling a home.
- **Does NAR have the funds to pay the proposed damages or post a bond to file an appeal?** NAR is going to appeal and has the funds to post bond, which allows us to proceed with our appeals and defer potential payment of damages. While appeals will take years, and we are confident we will ultimately prevail, we also are financially prepared for any final judgment.
- **How does this verdict affect other ongoing litigation, including the other seller lawsuit?** It doesn't. Cases are tried separately, and we remain confident we will ultimately prevail because we have a strong case we'll present on appeal and because our rules are pro-consumer and pro-business competitive.
- **Is there any scenario where NAR would consider settling?** NAR always has been open to a resolution that maintains a way for buyers and sellers to continue to benefit from the cooperation of real estate professionals and eliminates our members' risk of liability for the claims alleged. That being said, we remain confident we will prevail on our appeal.
- **Would NAR ever consider changing the cooperative compensation rule?** This rule always has been in place to protect and serve the best interests of consumers, support market-driven pricing and advance business competition. NAR consistently reviews and considers evolving its rules in a way that responds to changes in the industry and what best serves consumers.
- **Do you expect the plaintiffs to seek an injunction that would require NAR to stop making the rule mandatory or eliminate the rule altogether?** We cannot predict what plaintiffs will do. We would contest any such effort because this rule always has been in place to protect and serve the best interests of consumers, support market-driven pricing and advance business competition.
- **What's the status with the Department of Justice and has anything changed with this verdict?** We reached an agreement with the DOJ nearly two years ago. NAR has upheld our end of the agreement, and we expect the DOJ to do the same as affirmed by a federal court's careful ruling. That is a separate matter from the case of Burnett v. NAR et al.

