

A | THE SITZER/BURNETT ANTITRUST LAWSUIT, APPEAL, AND POTENTIAL IMPACTS



1. Q: What is the Sitzer/Burnett v. National Association of REALTORS® ("NAR") lawsuit about, and what was the jury's verdict?

A: This is a class action antitrust lawsuit filed in the federal court in Missouri. The plaintiff class includes home sellers in Missouri who sold their properties between April 29, 2015 and June 30, 2022 using one of four local multiple listing services ("MLSs"), where commission was offered from the listing agent to the buyer's agent. In 2019, the plaintiffs sued NAR and four large brokerages—Anywhere Real Estate (formerly Realogy), RE/MAX, Keller Williams Realty, and HomeServices of America. Plaintiffs claim that the defendants conspired to keep real estate commission rates high in violation of antitrust law, and NAR's cooperative compensation rule (MLS rule about offers of compensation from the listing broker to the buyer's agent through the MLS) caused the sellers to pay too much in real estate commissions. On October 31, 2023, after an 11-day trial, the jury decided against the defendants and issued a verdict of nearly \$1.8 billion. This amount could be tripled to more than \$5 billion. The case is not over yet because NAR, Keller Williams, and HomeServices of America have stated they will appeal. The two other defendants, Anywhere Real Estate and RE/MAX, settled before trial.

2. Q: Do individual C.A.R. members have liability because they are members of C.A.R. and NAR, or because they are affiliated with any of the franchise defendants?

A: No. The Sitzer/Burnett defendants are the franchise and NAR corporate entities. Plaintiffs did not sue and are not seeking damages from individual REALTORS®.

3. Q: What are the next steps in the Sitzer/Burnett lawsuit?

A: NAR will post the necessary bond to appeal the jury's verdict and NAR is confident it will ultimately prevail in this case. Also, NAR will ask the court to reduce the damages awarded by the jury.

4. Q: How long will the appeal process take, and what is the likely outcome?

A: The appeals process is very lengthy and therefore this lawsuit will probably not reach a final court decision for several more years. The trial judge hasn't issued a final order yet on the jury's October 31st verdict, and we do not know whether there will eventually be any injunctive orders that might require the defendants to alter their business practices or policies. It will take months before the defendants' first appellate briefs are filed in the appellate court. After those appellate briefs are filed with the court of appeal, C.A.R. will have better information about the specific legal arguments and grounds supporting the defendants' appeals.

5. Q: Who will receive the damages payout?

A: As noted above, it will likely take several years before there is a final decision in this case. If the jury's verdict is ultimately affirmed, and the defendants need to pay the damages, then each of the members of the plaintiff class (home sellers in Missouri during the relevant time period) and their attorneys would receive payment.

6. Q: What are the Sitzer/Burnett settlements for Anywhere Real Estate and RE/MAX?

A: Without admitting liability, Anywhere Real Estate agreed to settle all claims asserted against it in the Sitzer/Burnett case and a separate antitrust case (the Moehrl antitrust buyers class action) for \$83.5 million. The proposed settlement includes required practice changes including: prohibiting Company owned brokerages and their affiliated agents from claiming buyer agent services are free, requiring the inclusion of the listing broker's offer of compensation as soon as possible in active listings consistent with MLS rules and capabilities of third party website operators, prohibiting the use of technology or manual methods to sort listings by offers of compensation unless requested by the client, and reminding franchisees that the Company has no rule requiring offers of compensation to buyer agents. Anywhere Real Estate agreed to deposit \$10 million into the settlement fund after preliminary court approval is granted, \$20 million after court approval of fees and costs (typically granted with the court's final approval), and the remaining balance after final court approval and all appellate rights are exhausted. A final court approval of this settlement is expected by mid-2024.

A few weeks after the above settlement, RE/MAX agreed to a similar settlement for \$55 million and agreed to make similar changes in its business practices. The RE/MAX settlement also still requires court approval.

7. Q: Why didn't NAR settle?

A: Due to their extremely sensitive nature, settlement negotiations are conducted with the strictest confidentiality by the parties and their attorneys. Therefore, C.A.R. doesn't have information about possible settlement discussions or offers that might have been made to NAR, and C.A.R. doesn't know whether the plaintiff offered any settlement deals that were reasonable. It is possible there will be future settlement discussions between the parties. However, at this time, NAR is pursuing an appeal and is confident it will ultimately prevail in this case.

8. Q: Can a real estate brokerage that settled in the Sitzer/Burnett case be sued again in a different lawsuit?

A: It depends on the specific facts and circumstances. It is possible for a real estate brokerage that was sued in the Sitzer/Burnett case to be sued in other, different lawsuits by different plaintiffs who might allege new or different types of claims. However, depending on the conditions outlined in a final, court-approved settlement agreement involving a real estate brokerage, there may be protections that would limit or prevent future claims against a brokerage that has settled. For example, if the Anywhere Real Estate and RE/MAX proposed settlements are approved, the released franchises and their franchisees and affiliated agents should be protected from many similar types of antitrust claims.

9. Q: Will NAR file for bankruptcy?

A: It is too early to speculate about the possibility of bankruptcy because the Sitzer/Burnett case has not reached a final resolution, as NAR plans to appeal. It is uncertain whether NAR and the co-defendants will ultimately need to pay any damages (or if they do need to pay, how much would need to be paid).

10. Q: Can NAR pay for the necessary bond to proceed with an appeal?

A: Yes. NAR has stated it has sufficient funds to pay the bond and it will pursue an appeal.

11. Q: Will NAR increase its dues to pay for this and other lawsuits?

A: NAR has stated it does not plan to raise member dues.

12. Q: Do smaller, independent brokerages have the same risk of being sued in similar antitrust lawsuits?

A: No. There is a much lower risk because class action plaintiff law firms usually target large corporate defendants with a huge client base to ensure there's a large pool of consumers fitting within the description of the class (and potential higher dollars for pleaded damages). To proceed with a class action, plaintiff law firms need to certify the class by demonstrating the plaintiffs are all similarly situated, which is a high burden by itself and much more difficult to achieve if defendant brokerages are independent and have different company policies and practices. Also, plaintiff law firms usually target larger companies because it's more likely those companies have a lot of money to pay damages.

13. Q: What is the new Gibson class action lawsuit filed against NAR, Compass, eXp, Redfin and other brokerages about?

A: After the jury's verdict in the Sitzer/Burnett case, the same plaintiff's attorney filed another antitrust lawsuit titled Gibson et al. v. NAR et al., in the same Missouri federal court. Alleging very similar claims to those contained in the Sitzer/Burnett lawsuit, this lawsuit alleges a nationwide class including home sellers who listed a property for sale on an MLS with one of the seven named brokerage defendants, and who paid a buyer broker commission from October 31, 2019 to the present. Since this new lawsuit was just filed last week, there is very little available information at this time about the defendants' responses.

14. Q: Does the Sitzer/Burnett verdict affect the Department of Justice ("DOJ") settlement with NAR?

A: Not directly. Although the DOJ is probably monitoring developments in the Sitzer/Burnett case and other antitrust lawsuits, NAR previously reached a settlement agreement with the DOJ in 2020. The DOJ has also actively been filing some briefs or "Statements of Interest" in many of the MLS related lawsuits. We do not know whether the DOJ will take further action related to real estate business practices and commissions in the future.

B

MEMBERS' QUESTIONS ABOUT CALIFORNIA REAL ESTATE TRANSACTIONS AND BROKER PRACTICES

1. Q: Can listing brokers continue to offer compensation to buyers' brokers in the MLS? Is NAR's cooperative compensation rule still in effect?

A: Yes. As described above, the Sitzer/Burnett trial judge has not issued an order with any injunctions that would require NAR or the other defendants to change their business practices and policies. If there are any subsequent required changes or recommendations for real estate professionals, C.A.R. will immediately notify our members. In the meantime, C.A.R. has already been preparing for possible outcomes that might arise from the Sitzer/Burnett case and other antitrust lawsuits filed against NAR and brokerages. C.A.R. has been educating members about the recommended use of written buyer representation agreements and the importance of engaging in open and transparent discussions with clients about broker compensation. In addition, C.A.R. provides numerous resources to help members demonstrate and describe their value and expertise to clients. Many of these resources may be found here: <https://www.smartzonecar.org/>.

C.A.R will continue to consider and pursue additional initiatives to help C.A.R. members stay in compliance with antitrust laws while growing their businesses.

2. Q: Is a seller allowed to offer zero compensation to buyers' brokers in the MLS?

A: Yes, this is allowed, as is any other dollar amount or percentage. As described in more detail below, listing agents should talk to their seller clients about the listing broker's compensation, how it's negotiable, and the seller's various options for offering compensation to buyers' brokers. If a particular MLS does not allow entry of \$0 or 0%, the listing agent could offer the minimum allowed in that MLS.

3. Q: What should listing agents advise their seller clients when discussing the listing agreement and compensation?

A: Listing agents should talk about the amount of compensation to be paid by the seller to the listing broker. Listing agents should make it clear to the seller that the amount of compensation is negotiable. As mentioned below, a broker/brokerage may require that its agents request a minimum amount of commission for working on property listings, so if the seller is not willing to pay that minimum amount the seller may need to work with a different company. The listing broker should also talk about the seller's various options for paying the buyer's broker. Listing agents should make it clear that the amount of compensation to be offered to the buyer's broker is negotiable.

The seller should understand there are options to pay \$0 to the buyer's broker, offer another amount (dollar or percentage), or to invite requests from the buyer for seller to pay the buyer's agent as part of the buyer's offer. The listing agent should discuss the pros and cons of these options, such as the potential impact on buyers who may be considering the property (e.g., the possible effect on buyers who have less cash to close escrow, or buyers who need loans that will not allow financing real estate commissions, etc.). For risk management purposes, it is recommended that listing agents document in their files that these issues were discussed with their clients.

4. Q: Can a real estate broker have a minimum commission requirement for its agents with respect to their clients?

A: Yes. Each broker can determine and negotiate their commission with the broker's clients. The listing agreement is a contract between the broker and client. Similarly, a buyer representation agreement is a

contract between the broker and the broker's client. Accordingly, the broker can decide whether or not to accept certain business terms (e.g., the amount to be charged for listings handled by the brokerage), and the broker can tell the client about the terms that are acceptable to the broker. While this could be stated as a minimum commission requirement, the broker also has the freedom to negotiate something other than the minimum they've previously stated to their agents if they later choose to do so (such broker approvals must be made on a non-discriminatory basis).

5. Q: Should a real estate broker require its listing agents to not list a home on the MLS without offering a minimum amount of compensation to buyers' brokers?

A: No. Although the broker can set a minimum listing compensation requirement for its agents (see above), the compensation to be offered to buyers' brokers should be determined after discussions with the seller. As a reminder, this could be \$0 or another amount or percentage.

6. Q: Are buyers' agents allowed to have a conversation with their clients about which listed properties contain an offer of compensation to buyers' brokers, and which properties don't include such compensation, to help buyers decide whether to pursue a certain property or not?

A: Yes, the buyer's agent should discuss the available properties their clients may be interested in, and should also disclose the compensation (if any) that is being offered to the buyer's broker. C.A.R. strongly recommends that buyers' agents use a buyer representation agreement (such as C.A.R. Standard Form "BRBC"), which explains how compensation will be paid to the buyer's broker.

7. Q: If a buyer's broker is unhappy with the amount of compensation being offered in the MLS, can the broker negotiate this with the listing broker?

A: Yes, except that the buyer's broker cannot submit an offer to purchase the property which is contingent upon increasing the compensation to the buyer's broker. The buyer's broker may use a buyer representation agreement that sets forth the services to be provided, the amount of compensation to be paid to the buyer's broker, and an agreement that the buyer will make up the difference if an offer of compensation falls short. Alternatively, and only if the buyer is agreeable, the buyer can request the seller to pay an additional specified amount or even condition the offer on seller's agreement to pay an additional amount to the buyer's broker. However, the buyer must be advised about the pros and cons of submitting such a condition or request, and the buyer's broker cannot pressure the client in a way that is inconsistent with their fiduciary duty.

8. Q: How does C.A.R.'s "Buyer Representation and Broker Compensation" (BRBC) form work?

A: How may it be terminated by the client? How can C.A.R. members learn more about how to use this form? C.A.R. members can call the Member Legal Hotline and speak with an attorney for any questions about the BRBC. The Member Legal Hotline number is: (213) 739-8282; (213) 739-8350 (for broker-owners, office managers, or Designated REALTORS®). C.A.R. has a [Quick Guide](#) and [Legal Q & A](#) that explain this agreement. C.A.R. is also offering a [free class](#) on this topic to help members.

9. Q: Did C.A.R. recently update its Procuring Cause Guidelines related to buyer representation agreements?

A: Yes. The Procuring Cause Factors were revised in December 2022, and Hearing panels in California are expected to use the new Guidelines for all procuring cause commission dispute arbitrations. The most important substantive changes concern Factors 19-22, which now give more weight to the existence of a written agreement between the buyer and the broker. The goal is that revising the factors in this way will incentivize brokers to enter into written agreements with buyers because they will know that doing so will improve their chances of being entitled to compensation in the event of a procuring cause dispute. More information may be [found here](#).

10. Q: Will buyer broker agreements become mandatory under California law?

A: We don't know whether there will be future proposed legislation that requires California licensees to use buyer representation agreements. As mentioned above, C.A.R. continues to strongly recommend that buyer brokers use a written buyer representation agreement such as C.A.R. Standard Form "BRBC."

11. Q: Is there a rule that fees or commissions charged by a VA buyer's agent can't be paid by the buyer?

A: Yes, we believe this is the current rule.

12. Q: What if a buyer doesn't have enough money to pay for a buyer's agent?

A: Buyers may have opportunities to structure their broker's compensation in the transaction. This would need to be negotiated between the buyer and seller. Otherwise, some buyers may choose to forgo representation if they can't afford it.

13. Q: If I am a listing agent and I'm communicating with an unrepresented buyer in a transaction, how can I establish that I'm not representing the buyer?

A: First, the listing agent should clearly communicate to the buyer that they are not representing the buyer. The listing agent may use the "Buyer Non-Agency Agreement" form (BNA) to help document the fact that there is not an agency relationship between them. It is also recommended that the listing agent continue to remind the buyer in written communications that the listing agent does not represent the buyer and cannot advise the buyer (the buyer should consult with their own counsel), and that the communications and documents being provided by the listing agent to the buyer are for the benefit of the listing agent's seller client.

14. Q: Do the agency disclosure and agency confirmation forms protect licensees from potential liability in these types of antitrust lawsuits?

A: No. Although the agency disclosure and agency confirmation forms required under California law do provide important notices and information to consumers about the duties and relationship between the real estate licensee and their client, they are not a substitute for the broker compensation discussions that agents should have with their clients.

15. Q: Do the antitrust lawsuits affect the ability of licensees to be dual agents?

A: No. Dual agency is lawful in California, and unaffected by the Sitzer/Burnett case or other lawsuits.

16. Q: Are there insurance policies to protect real estate brokerages from antitrust lawsuits?

A: Some insurance policies do contain limited antitrust coverage (e.g., there may be coverage for some attorneys' fees/defense costs). There are many kinds of insurance policies, and the commercial insurance market and types of carrier offerings change from year to year. It is best for brokers to consult with their own insurance professional to determine the details contained in their insurance policies and specific coverage provisions.

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