



**Consumer Federation of America**

## **FAQs ON RECENT, LARGE, REAL ESTATE COMMISSION LAWSUITS**

### **What Consumers Need to Know about Real Estate Commissions in the Face of Legal Challenges**

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In early October, a federal judge in Illinois denied a petition from the National Association of Realtors (NAR) to dismiss a lawsuit challenging structural price-fixing by the industry (*Moehrl v. NAR*). This court's decision makes it far more likely that the lawsuit, and a similar one filed in Missouri (*Sitzer v. NAR*), will eventually lead to an “uncoupling” of commissions – home sellers and buyers each paying for services rendered by their own agents (and the brokers they report to). Today, because of industry rules, sellers pay the entire 5-6 percent commission, yet have no real ability to negotiate the portion paid to buyer brokers.

This FAQ discusses the potential outcomes of the two cases and their impact on consumers. For more detailed and documented information on the subject, see reports under “real estate brokerage” in the “housing” issues section of the Consumer Federation of America website ([www.consumerfed.org](http://www.consumerfed.org)).

#### **How Does the Industry Set Prices?**

Industry rules effectively require listing brokers to set commissions for buyer brokers when they list properties on local Multiple Listing Services (MLSs). Almost all of these buyer broker commission “splits” have ranged between 2.5 and 3.0 percent nationwide, and tend to be uniform in the same city or town. Sellers who ask their agent to lower the buyer commission split are accurately informed that buyer brokers would then be less likely to show their property.

Buyers, if they do ask about these splits, are usually informed by their broker that the commission is paid for by the seller.

For a couple of decades, discount listing brokers have sought to compete by charging lower commissions, sometimes in exchange for less customer service. Initially some of these brokers promised rates as low as one or two percent. Yet over time, because their listings were not shown by buyer brokers, discounters such as Redfin were compelled to offer these brokers the full buyer commission split of 2.5-3.0 percent. Even then, discount listing brokers have been unable to gain an appreciable share in any major geographic market.

### **Why Is the Litigation Likely to Change Industry Practices?**

There are a number of reasons. Four are especially important.

First, the lawsuits were brought by some of the largest and most successful class action litigators in the country. They would not have brought these cases if they thought they stood little chance of achieving a substantial settlement.

Second, court rejections of the industry appeals for dismissals in both lawsuits appear emphatic. In the Illinois case, in a 25-page decision the judge concluded, in rejecting dismissal, that plaintiffs sufficiently pleaded that they were victims of an antitrust conspiracy involving restraint of trade and, as a result, suffered antitrust injury. The earlier decision of the Missouri court was similar and has already been upheld by a court of appeals.

Third, the U.S. Department of Justice (DOJ) has indicated concerns similar to that of the plaintiffs and is pursuing its own investigation. Late last year in a federal court filing, DOJ acknowledged the existence of its Civil Investigative Demand related to potential real estate antitrust violations. Credible reports also suggest that earlier that year, DOJ had requested data on buyer commission splits and other broker compensation from CoreLogic Inc, a major source of industry data.

Fourth, there's a growing recognition that the industry's anti-competitive structure prevents technological advances from lowering commission levels. The internet and real estate portals such as Zillow have allowed home buyers to search for and learn much about homes on their own, lowering agent costs. Yet, uncompetitive buyer commission splits have prevented these service cost reductions from being passed on to consumers through lower rates. According to the most quoted source monitoring these rates (Real Trends), average commissions were higher in 2019 (5.7%) than they were in 2005 (5.0%).

## **Would Disclosure of Buyer Broker Commission Splits Provide a Satisfactory Remedy to the Complaint?**

Both antitrust lawsuits seek to stop anti-competitive practices related to buyer commission splits. However, as the case proceeds, the industry may seek a disclosure “remedy” that stops short of uncoupling commissions. Could disclosures greatly benefit consumers and act to curtail anti-competitive practices? We think not.

Effective disclosure of buyer broker commissions would provide a very limited benefit to consumers. At present, nearly all MLSs make available information on buyer commission splits to brokers but prohibit publication of this information, thereby hiding these splits from buyers and the general public. In 2019, the Pacific Northwest MLS allowed listing brokers to publish commission splits in their property listings. To date, only one firm has published this information in a portion of their service area, and there is no indication that most area firms will follow suit. Given this experience, if a court decision simply allowed all brokers nationwide to publish buyer commission splits in their listings, there is no reason to believe that most brokers would choose to do so.

If, on the other hand, brokers were required to make available information on buyer splits to all buyers and the general public, there would be a modest benefit to consumers in that buyer brokers would be less likely to steer buyers away from properties offering low commission levels. This steering has been acknowledged by industry members and has been documented in one persuasive study. Those brokers tempted to avoid low-commission listings could be deterred somewhat by knowing that clients might suspect steering, though brokers could still steer buyers through positive or negative comments about properties.

However, we do not think that this disclosure would appreciably increase competition over commission levels. Most home buyers focus most of their attention on purchasing a property and the price of this property. Moreover, they believe, and often are led to believe by their agents, that they are not paying the commission. Accordingly, there is little reason to conclude that, simply because of a disclosure, most buyers would focus any attention on the buyer commission, let alone try to negotiate it. With this in mind, listing agents would continue to advise sellers against lowering commission splits.

## **Would the Uncoupling of Commission Rates Significantly Benefit Consumers?**

We believe that if both sellers and buyers paid commissions to their own brokers, both would substantially benefit.

The uncoupling of commissions would immediately reduce the commission expenses of sellers and would give buyers the opportunity to negotiate buyer commission splits that previously had been difficult and often impossible to negotiate. It would also greatly free discounters and tech companies to offer an array of service options at lower prices. No longer would discount listing brokers be forced to provide full buyer commission splits. And discount buyer brokers would not be hamstrung by anti-rebate statutes that exist in ten states, nor would they feel as much pressure from listing brokers determined to maintain industry-wide 5-6 percent commissions.

Traditional full-service brokers would probably seek to maintain buyer commission splits of 2.5-3.0 percent, and those who provide first-rate service might well be able to sustain this level. However, the many buyer agents with little experience who did not have a well-established reputation in their communities would likely feel pressure from clients to lower commissions. Buyers, perhaps informed and influenced by increasingly active discounters, would be more aware that they paid commissions and would be more likely to ask if they could be reduced.

As discount brokers gained market share and inexperienced agents lowered commission levels, the average commission paid would likely decline. To what extent? Our best guess would be to an overall 4 percent level, with splits of 2 percent to both listing and buyer agents. Such a rate decline could well lower annual commissions paid (currently totaling around \$100 billion) more than \$20 billion and quite possibly as much as \$30 billion. This lower average rate, though, would disguise great variation in commissions on individual sales, from perhaps one percent to six percent. The residential real estate brokerage market would increasingly resemble other competitive markets where price was related to service quality.

Some industry leaders have argued that decoupling commissions would disadvantage first-time home buyers with lower incomes who would now be required to directly compensate their agents. Mortgage lenders and the GSEs would certainly step in here by allowing buyers to include this commission in the amount financed. This inclusion would serve the interests of lenders and would be strongly supported by the real estate industry.

Moreover, buyers would effectively have the ability to negotiate the 2.5-3.0 percent level down. Over time the laws of economics would work to lower home sale prices to offset this new expenditure. To a great extent the buyer's commission is built into the sale price. When it is removed, and seller commission costs are reduced, sale prices would reflect that reduction.

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