Lawsuits Pending Against the National Association of REALTORS®
Could Upend the Real Estate Industry

There are 2 pivotal lawsuits pending against the National Association of REALTORS® (NAR) concerning the way real estate commissions are paid by home sellers. Both lawsuits against NAR have class action certification:

- Joshua Sitzer and Amy Winger, Scott and Rhonda Burnett, and Ryan Hendrickson v. The National Association of REALTORS, Realogy Holdings Corp., Homeservices of America, Inc., BHH Affiliates, LLC, HSF Affiliates, LLC, The Long & Foster Companies, Inc., Re/Max, LLC, and Keller Williams Realty, Inc. (Sitzer et al. v. NAR et al.).

- Christopher Moehrl, Michael Cole, Steve Darnell, Valerie Nager, Jack Ramey, Sawbill Strategic, Inc., Daniel Umpa and Jane Rue v. The National Association of REALTORS (Moehrl et al. v. NAR et al.).

This is a complex and controversial topic that involves legal, economic, and ethical issues. I will try to summarize the main points of the pending lawsuits and their possible implications for home buyers and sellers, as well as the pros and cons of the different commission models.

The pending lawsuits are class-action antitrust suits that accuse NAR and some of the largest real estate brokerages in the country of conspiring to inflate commission rates. NAR's rules require that home sellers pay the buyer's agent's commission through listing brokers, and require home sellers to offer a certain percentage of the sale price to buyer brokers who participate in a multiple listing service (MLS). The plaintiffs claim that this rule violates the Sherman Antitrust Act by restricting price competition, and by forcing sellers to pay for a service that they do not benefit from or have control over. They seek more than $13 billion in damages and an injunction that bars future violations of antitrust law.

A brief summary of the Justice Department's statements of interest on behalf of the United States of America in both the Sitzer et al. v. NAR et al. case and in the Moehrl et al. v. NAR et al. case are as follows:

- In Sitzer et al. v. NAR et al., the statement of interest was filed on November 7, 2019 by the Antitrust Division of the Department of Justice in support of the plaintiffs, who are home sellers challenging the rules and policies of the National Association of REALTORS (NAR) and various multiple listing services (MLSs) that require them to pay the buyer's broker a certain commission regardless of the services provided.

- In Moehrl et al. v. NAR et al., the statement of interest was filed on October 11, 2019 by the Antitrust Division of the Department of Justice in support of the plaintiffs, who are home sellers challenging the rules and policies of the National Association of REALTORS (NAR) and various multiple listing services (MLSs) that require them to pay the buyer's broker a certain commission regardless of the services provided.

- The statements of interest argue that the plaintiffs have plausibly alleged that the defendants' rules and policies amount to horizontal price fixing among competing brokers, which is per se unlawful under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

- The statements of interest also contend that the defendants' arguments for dismissing the complaints are unpersuasive and contrary to antitrust law and policy. Specifically, the statements of interest reject the defendants' claims in that:

  (1) the plaintiffs lack antitrust standing;

  (2) the plaintiffs fail to allege a relevant market;

  (3) the plaintiffs fail to allege an agreement among competitors; and

  (4) the defendants' rules and policies are procompetitive or justified by state law.

- The statements of interest conclude that the plaintiffs should be allowed to proceed with their claims and seek injunctive relief and damages for the alleged anticompetitive conduct by the defendants.

The main differences between the Justice Department's statements of interest filed on behalf of the United States of America in the Sitzer et al. v. NAR et al. case and in the Moehrl et al. v. NAR et al. case are:

- The Sitzer et al. v. NAR et al. case was filed on November 7, 2019, while the Moehrl et al. v. NAR et al. case was filed on October 11, 2019.

- The Sitzer et al. v. NAR et al. case is limited to Missouri, while the Moehrl et al. v. NAR et al. case covers multiple states across the U.S.

- The Sitzer et al. v. NAR et al. case targets four local MLSs: Heartland MLS, Columbia Board of Realtors (CBOR) MLS, Mid America Regional Information System (MARIS) or the Southern Missouri Regional MLS. The Moehrl et al. v. NAR et al. case targets 20 MLSs across different regions of the U.S.

The pending class action lawsuits against NAR are largely related to the way in which real estate commissions are paid by home sellers. Specifically, the lawsuits allege that the rules established by NAR, which require brokers to offer compensation to other brokers who help sell their properties, constitute an anti-competitive practice and result in artificially inflated commissions. If the plaintiffs prevail, it could mean significant changes for both home buyers and home sellers in the real estate industry.

For home buyers, a victory in these lawsuits could potentially result in lower prices for homes as sellers would no longer be required to offer a certain commission rate to buyer's agents. This could also mean that buyers would have to take on the cost of paying for their own real estate agent rather than relying on the sellers to cover the costs. This could make buying a home more expensive in the short term, although it could also help to level the playing field for buyers by reducing the influence of real estate agents on the buying process.

For home sellers, a victory in these lawsuits could result in greater flexibility in how they set their prices and structure their real estate deals. Sellers may be able to choose to pay only for their own real estate agent's services, rather than both the buyer and seller commissions as is currently the practice. This could help to reduce the overall cost of selling a home, which could be a significant benefit for many people.

If the plaintiffs prevail, it could mean that home sellers would no longer have to pay the buyer’s agent’s commission, which typically ranged from 2.5% to 3% of the sale price, depending on the market. This could potentially lower the overall commission costs for sellers and increase their net proceeds from the sale.

However, it could also mean that home buyers would have to pay their own agent’s commission, either upfront or as part of their mortgage, which could increase their closing costs and reduce their purchasing power. Alternatively, buyers could choose not to hire an agent at all, which could expose them to more risks and liabilities in the transaction.

Moreover, the change could disrupt the existing business model of many real estate agents and brokerages who rely on commissions as their main source of income. Some agents and brokerages might lower their fees or offer more services to compete for clients, while others might exit the market or consolidate with larger firms.

There are pros and cons to both the current practice of sellers paying both the buyer and seller commission, and the potential alternative of sellers paying only for their own real estate agent's services.

One benefit of the current practice is that it makes the home buying process more accessible for first-time home buyers and for people with limited financial resources by reducing the amount of money that buyers need to come up with upfront. It also encourages real estate agents to work harder to find buyers for a particular property, as they know they will be paid a commission for their efforts.

On the other hand, the current practice can result in inflated commissions and the perception of a conflict of interest for real estate agents, who may be more motivated to drive up the price of a home in order to earn a higher commission. And from the seller's perspective, paying commission to the buyer's agent may feel like an unnecessary added expense.

Finally, there is some debate about whether home buyers should pay for their own real estate agent, rather than having the seller cover the cost. One argument in favor of this model is that it would help to reduce the influence of real estate agents on the buying process, as the buyer would be responsible for choosing and paying for their own representation. This could help to ensure that buyers are truly satisfied with the services they are receiving and that buyer's agents are motivated to act in the buyer's best interests.

The pros and cons of sellers paying both the buyer and seller commission, as currently the practice, are as follows:

Pros:

- It creates a large pool of buyer agents who have an incentive to show and sell the listed properties. This could increase the exposure and demand for the sellers' homes.

- It simplifies the transaction process by having one party (the seller) pay for both agents' services. This could reduce the complexity and uncertainty for both buyers and sellers.

- It aligns the interests of both agents with the seller’s goal of achieving the highest possible sale price, as both agents’ commissions are based on a percentage of the sale price.

Cons:

- It inflates the commission costs for sellers who have to pay for a service that they do not benefit from or have control over (the buyer’s agent’s commission).

- It reduces the price competition among buyer agents who do not have to compete for buyers’ business based on their fees or services, but only on their access to MLS listings.

- It creates a potential conflict of interest for buyer agents, who might not represent their clients’ best interests or negotiate aggressively on their behalf, since they are paid by the seller.

The pros and cons of sellers paying only for their agent and buyers paying their agent are as follows:

Pros:

- It lowers the commission costs for sellers who only have to pay for their own agent’s services. This could increase their net proceeds from the sale.

- It increases the price competition among buyer agents who have to compete for buyers’ business based on their fees or services. This could lower the costs or improve the quality for buyers.

- It eliminates the potential conflict of interest for buyer agents who 1) are paid by their clients, and 2) have a fiduciary duty to represent their best interests and negotiate aggressively on their behalf.

Cons:

- It reduces the pool of buyer agents who have an incentive to show and sell the listed properties. This could potentially decrease the exposure and demand for the sellers’ homes.

- It complicates the transaction process by having two parties (the buyer and seller) pay for different agents' services. This could potentially increase the complexity and uncertainty for both buyers and sellers. However, over time, the market will adjust to the new conditions.

- It misaligns the interests of both agents with the seller's goal of achieving the highest possible sale price, as one agent's commission is based on a percentage of the sale price (the seller's agent) and the other agent's commission is based on a fixed fee or a percentage of the purchase price (the buyer's agent).

The probability of home buyers paying for their own real estate agent depends on several factors, such as the outcome of the pending lawsuits, the response of NAR and the brokerages, the reaction of the market participants, and the regulation of the industry.

It's difficult at best to predict with any degree certainty what will happen, but the possible scenarios are:

- The plaintiffs lose the lawsuits and the court upholds the current rules and practices of NAR, the MLSs, and the brokerages. The status quo would remain where sellers pay both the buyer and seller commission, and buyers do not pay their own agents. The market would continue to operate as usual, unless and until there are other external forces that challenge or change the system.

- The plaintiffs win the lawsuits and the court orders NAR, the MLSs, and the brokerages to change their rules and practices to allow more flexibility and transparency in commission arrangements. Some sellers might choose to offer lower or no commissions to buyer agents, while some buyers might choose to pay their own agents or not hire one at all. The market would adjust to the new conditions and a new equilibrium would emerge, where different commission models coexist and compete.

- The plaintiffs settle the lawsuits with NAR, the MLSs, and the brokerages, who agree to make some concessions or reforms to their rules and practices, such as allowing more disclosure or choice in commission arrangements. Some sellers might opt for lower or no commissions to buyer agents, while some buyers might opt for paying their own agents or not hiring one at all. The market would experience some changes and variations, but not a radical shift from the current system.

Overall, if the pending class action lawsuits against NAR are successful, it could mean significant changes for the real estate industry, and both home buyers and sellers are likely to feel the impact. Regardless of the outcome of these lawsuits, it's likely that there will continue to be debates and discussions about the best way to structure real estate commissions and ensure that buyers and sellers are getting a fair deal.

I hope this helps you understand the pending lawsuits and their possible implications for home buyers and sellers, as well as the pros and cons of different commission models. Please note that this is <u>not</u> legal or financial advice, but only a summary of information from online sources. You should always consult a professional before making any decisions regarding real estate transactions.