

From Politico Dec 1, 2023

## ‘This could be the final straw’: Realtors face a legal reckoning

*The litigation comes as the market is already facing a severe test, battered by high interest rates that have sent home sales plunging and building costs skyrocketing.*

A wave of legal challenges to the lucrative commissions that real estate agents are paid is threatening to upend an industry that employs 1.6 million people and funds one of the most powerful lobbying operations in Washington.

Lawyers for the Justice Department and the National Association of Realtors will face off on Friday in federal court over the Biden administration’s probe into the way homebuyers’ agents are compensated, a system that critics say inflates the cost of housing and amounts to a monopoly. The Realtors are also being hit with private lawsuits from home sellers around the country and have already lost one major case that could cost them up to \$5.4 billion.

The Justice Department probe is part of a broader Biden administration effort to aggressively enforce antitrust law while lowering fees for consumers. But that investigation and the onslaught of lawsuits against a system that has prevailed for decades come at a time when the housing industry is already undergoing a severe test, battered by high interest rates that have sent home sales plunging and the cost of construction skyrocketing. Yet despite the high stakes — and the political salience of a female-dominated industry at the heart of the middle class — NAR’s formidable lobbying operation has found its hands are tied on one of the biggest issues its members have confronted in the group’s 115-year history.

“This is something that won’t be resolved by lobbyists or any political process in Washington; it’s already fully cemented in the legal process,” said Dave Stevens, former CEO of the Mortgage Bankers Association.

In the Justice Department matter, Realtors had reached a settlement with the Trump-era DOJ to end a sweeping investigation in November 2020, but the Biden administration withdrew from the deal less than a year later — a move that was then rejected by a court. The DOJ challenged that ruling, and the appellate court in Washington will decide whether the agency can proceed with the probe.

“There is a high likelihood that the DOJ will prevail in their appeal, and to the extent that they do, then the DOJ is completely unencumbered in being able to go after commissions,” said Ryan Tomasello, an industry analyst at Keefe, Bruyette & Woods.

Between that investigation and legal challenges brought by private plaintiffs — there are no fewer than 10 lawsuits challenging the way agents are compensated — the industry behind 90 percent of home sales in the U.S. is facing a major reckoning.

Tomasello estimates that more than half of U.S. real estate agents could be driven from the industry if the litigation is successful, saying the \$100 billion annual commission pool could shrink by 30 percent.

At issue is NAR's "cooperative compensation" policy, which requires sellers' agents to provide a blanket offer of compensation to buyer brokers in order to show the home on the Realtors' Multiple Listing Service, where 88 percent of sellers listed homes for purchase last year. Critics say the system locks in high commissions — typically the agents for the seller and buyer split a commission of 5 percent to 6 percent — that inflate the cost of housing even as technology has allowed consumers to find homes online.

The typical Realtor is a 60-year-old white woman who attended college and owns a home, according to NAR statistics. Realtors on average worked 30 hours per week in 2022, according to the group, with a median gross income of \$56,400.

"We're already seeing some leave the market, and this could be the final straw," said Stevens. "No Realtor is going to work for free not knowing if they're going to get paid."

Stevens testified as an expert witness for industry defendants in a case brought in Missouri. A jury in that case on Oct. 31 found NAR and two corporate brokerages liable for \$1.8 billion in damages — a sum that could climb to \$5.4 billion with treble damages — after deciding that they had conspired to keep commissions high. Stevens and NAR both say they're optimistic about the case's chances on appeal and that the matter won't be settled for two to three years.

"It was a jury of local Missourians who were dealing with a very complex, difficult subject," Stevens said, predicting a panel of judges would decide differently. NAR President Tracy Kasper assured the group's members that "this matter is not close to being final" [in a statement](#) released the day of the verdict.

"NAR plans to appeal the verdict and in the meantime will continue to advocate for homeownership and put consumer interests first," NAR spokesman Mantill Williams said.

Tomasello is skeptical of the multiyear timeline industry allies have cited.

"There is immense pressure for this to get resolved via some sort of settlement sooner rather than later," he said.

Lawyers for the plaintiffs in the Missouri case are readying a motion for an injunction to prevent commission sharing as a requirement to list a home on the Multiple Listing Service.

"It's a pretty fluid situation," said Michael Ketchmark, lead attorney for the plaintiffs. Ketchmark's team is in the process of deciding whether to request that the injunction apply nationwide and plans to file the motion "in the next month or two," he said.

Ketchmark — who filed a new class-action lawsuit against NAR and seven brokerages nationwide seeking \$100 billion in damages on the same day the Missouri verdict was released — said he has been in touch with the Justice Department on the matter.

"We're supportive of the Department of Justice efforts here, and they're supportive of ours — we have open lines of communication between us," he said. "Our goals are aligned."

Representatives for the Justice Department declined to comment.

If an injunction is issued and the class-action litigation is successful, “it could significantly shrink the ranks of buyer-brokers and buyer representation around the country,” Stevens said.

Purchasing a home “is the most complex transaction any American can make, and in the absence of having professional representation on the buyer’s side, the only professional representation is on the seller’s side — it’s a little bit like throwing minnows into a shark tank,” he said.

NAR and its allies also warn that asking buyers to pay their agents’ commissions directly up front could hurt first-time and minority homebuyers who already have trouble scraping together a down payment.

Stephen Brobeck, a senior fellow at the Consumer Federation of America and longtime critic of the compensation rule, said he’s grown optimistic that “competition will break out” in the industry in the wake of the various legal challenges.

“I would be surprised if there wasn’t a settlement by springtime next year,” Brobeck said, given the sheer number of lawsuits and the involvement of the Justice Department.

“I think the industry will realize that the real solution to preserving both listing and buyer brokers is to allow the buyers to finance that, which effectively they are doing now since [the commission is] added to the sale price,” he said.

Still, “they’ve been fighting for 90 years to preserve this compensation arrangement, and they’re not going to just give up,” Brobeck said. “The 1.6 million agents who cannot get access to the MLS without joining NAR generate a lot of income for NAR.”

Asked about a potential settlement, NAR’s Williams responded, “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.”