

Arizona Association of REALTORS®

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A Legal Update on Sitzler/Burnett Lawsuit

In 2019, Sitzler (now Burnett) sued the National Association of REALTORS® (NAR) and four large real estate brokerages claiming their policies and practices were an anticompetitive restraint on free trade. *Sitzler/Burnett v. NAR, et. al.* The lawsuit is a class action suit and was brought on behalf of Missouri sellers who sold homes using the defendant brokerages from 2015 to present where the property was sold via one of four MLSs and a commission was paid from the seller's side to the buyer's side (Plaintiffs). The lawsuit centers around NAR's Participation Rule that was interpreted as requiring REALTORS® to make offers of compensation to buyer's agents cooperating in the MLS.[1] Plaintiffs claim that NAR and the defendant brokerages that follow the rule artificially set compensation rates higher than market forces. Plaintiffs are seeking damages in an amount equal to all buyer broker compensation paid by them plus punitive damages. The lawsuit is currently in the middle of a three-week jury trial and a verdict is expected shortly.

Prior to the trial, two of NAR's co-defendants settled. RE/MAX settled for \$55M and Anywhere Real Estate (formerly known as Realogy and the parent company of Coldwell Banker, Century 21, and others) settled for \$83.5M. In addition to monetary compensation, the settling defendants also agreed to make the following changes to their business practices:

1. Prohibit their agents from claiming buyer agent services are free;
2. Require their agents to include the listing broker's offer of compensation as soon as possible in each active listing;
3. Prohibit their agents from using any technology to sort listings by offers of compensation, unless requested by the client;
4. Advise their agents there is no rule requiring offers of compensation;
5. Require their agents to clearly disclose to clients that commissions are not set by law and are fully negotiable;
6. Eliminate any minimum client commission requirements that Anywhere Real Estate owned brokerages may have; and
7. Not require their agents to belong to NAR.

Significantly, many of the non-monetary settlement terms were agreed to and implemented by NAR years ago and have been standard practice since. Furthermore, nothing in these settlements precludes agents within these brokerages from choosing to become

REALTORS® so that they can continue to take advantage of the numerous services and benefits REALTORS® receive. Please note the Court must agree to all the settlement terms and final Court approval is not expected until mid-2024.

While a verdict in the lawsuit is forthcoming, a full resolution will likely not be reached anytime soon. Whichever party loses at the trial will appeal the decision and it will likely take a couple more years to exhaust all appeals. What occurs between the verdict announcement and the final resolution of the dispute is uncertain because the possible outcomes of the trial are numerous, including, but not limited to: 1) the Plaintiffs could lose; 2) the Plaintiffs could prevail against some defendants but not others; 3) the Plaintiffs could prevail against all defendants; 4) the Plaintiffs could prevail but only be awarded minimal or no damages; 5) the Plaintiffs could prevail and be awarded extraordinary damages; 6) the jury could rule the conduct of the defendants support damages but find the Participation Rule is lawful; 7) the jury could rule the Participation Rule is inherently unlawful; or 8) some combination thereof.

But even under the worst-case scenario where the usage of NAR's Participation Rule is deemed unlawful, presumably any Court ordered changes would mirror the 7 non-monetary settlement terms above, many of which are already in place. After all, the Plaintiffs believe the 7 changes would make the use of the Participation Rule lawful since they agreed to them. It also would seem unlikely a judge would outright prohibit a seller's right to offer compensation to a buyer's agent if they knowingly and voluntarily choose to do so, as is currently the case. In short, buyer agent compensation offered in the MLS is unlikely to be prohibited and possible adjustments to business practices will not take effect in the near future.

Human nature urges us to do something when we feel threatened or concerned. Obviously, we cannot make arguments to the jury, nor would we want to since NAR is represented by the finest attorneys specializing in antitrust law. Regardless of the outcome, REALTORS® must communicate our value to our clients. Agent's Value Proposition and competition.realtor are great resources to explain all the work performed for the client and the benefits your expertise provides. REALTORS® are also encouraged to use Buyer Broker Employment Agreements that clarify the commission to be paid for buyer agent services and who will be paying them. Finally, touting the analogy told to the jury may help visualize the benefits of the MLS system. NAR attorneys stated the MLS system is like offering a reward for finding a lost dog. Only the person producing the lost dog is compensated and the owner is happy to pay for the service. In this example, as is the case with the MLS, the owner chooses to offer monetary compensation to incentivize someone else to act. Of course class action lawyers can try and convince owners, after the fact, that people should have searched and produced the dog for free.

For additional information on the Sitzler/Burnett Lawsuit:

Special Report: What's at Stake in the Sitzer/Burnett Trial (nar.realtor)

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[1] NAR spokesperson Mantill Williams has recently explained that “NAR’s MLS policy requires participants to communicate an offer of compensation to other MLS participants and that offer can be any amount, including \$0.”