

Sitzer v. Burnett

A New Age in Real Estate

By Blake Deal, Esq



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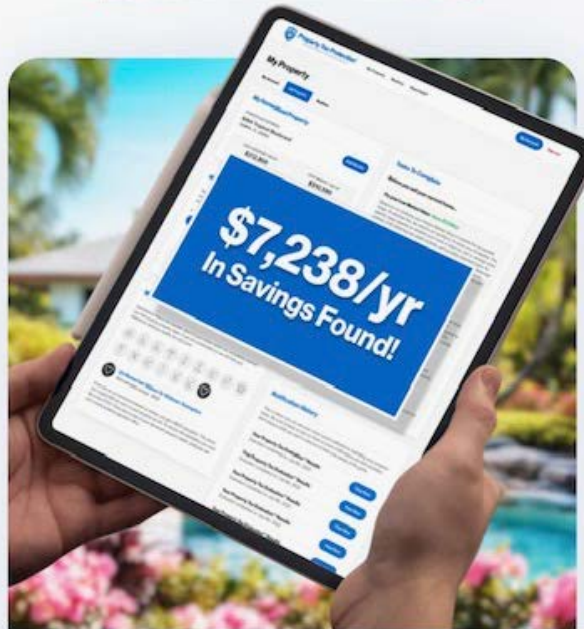
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DISCLAIMER:

The views expressed in this presentation are those of Blake F. Deal III, Esq. In developing these opinions, I have read the key complaints and similar case law, studied federal and state (Florida) Anti-Trust law and related cases, and consulted with experienced litigation attorneys- including class action attorneys. The possible outcomes of litigation are very difficult to predict, and where I have made any predictions I have considered the possibilities of other outcomes to the best of my ability. My opinions should not be considered as dispositive or definite, but they reflect my most honest assessment of the situation at the present time.



Why is this probably the first presentation on this you have seen?



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GARD Shines Spotlight on Key Real Estate
Issues



NEWS & MEDIA



JANUARY 11, 2024

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GARD Shines Spotlight on Key Real Estate Issues

By Tom Butler

GARD- the big annual legislative real estate lobbying event in Tallahassee attended by hundreds and.....

Nada.

Nothing.

Not even a mention.

OVERVIEW- What is Burnett v. Sitzer about? What laws were supposedly broken and what liability is there?

In a nutshell, the case argues that because of anti-competitive practices engaged in by the real estate/broker industry, that Sellers have been forced to pay higher commissions than they should have had to pay. The case argues that Sellers should not have to pay any of the Buyer's agent's commission, and since the split is usually 50/50, that the damages are essentially ½ of the real estate commissions paid by the 500,000 plaintiffs! The jury completely agreed.

- Filed in the 8th Federal Circuit Court in Missouri
- Civil Anti Trust case filed under the Sherman Act and the Clayton Act
- Class action plaintiffs totaling 500,000 Missouri homeowners.
- Defendants:

Anywhere Real Estate Inc., Defendant- SETTLED \$83.5MM

BHH Affiliates, LLC, Defendant

Berkshire Hathaway, Inc., Defendant

HSF Affiliates, LLC, Defendant

HomeServices of America, Inc., Defendant

Keller Williams Realty, Inc., Defendant

National Association of Realtors, Defendant

RE/MAX Holdings, Inc., Defendant

RMCO, LLC,, Defendant

Re/Max LLC, Defendant- SETTLED \$55MM

Realogy, Defendant

Realogy Holdings Corp., Defendant

The Long & Foster Companies, Inc., Defendant



\$1.8 BILLION. BECAUSE OF ANTI-TRUST PROVISIONS AUTOMATICALLY TRIPLED TO

\$5.4 BILLION!

WHAT IS AN ANTI-TRUST CASE?

- US Anti-Trust Law was born out of the days of the “Robber Barons” of the late 19th century who controlled vast amounts of wealth and power. They used “Trusts” to control everything. That’s why it’s called “Anti-Trust” law.





- Anti-Trust Laws
 - Sherman Act of 1890- prohibits conspiracies and monopolisation.
 - Sect. 7 of Clayton Act- prohibits certain mergers or acquisitions of stock or assets.
 - Robinson-Patman Act of 1936- prohibits discriminatory pricing
 - Wilson Tariff Act of 1894- prohibits price-fixing of US Imports
- An Anti-Trust lawsuit can be brought by ANYONE who was allegedly damaged by the anti-competitive activities. Civil Right of Action.
- DOJ can bring a civil OR criminal Anti-Trust case
- Right to a Trial by Jury in Anti-Trust cases
- Anti-Trust law provides for Treble (triple) damages to strongly discourage anti-competitive behavior

REVIEW OF WHAT HAPPENED IN THE BURNETT v. SITZER CASE

In Sitzer v. Burnett, and in all of the “copycat” cases filed, the complaints allege that the National Association of Realtors, state-level Realtor associations (like Florida Association of Realtors), and local level Realtor Associations (like NEFAR), have conspired together with real estate brokers to create a system of rules and policies centered around the Clear Cooperation Policies of MLS that violate the Anti-Trust laws. They allege that the result of the conspiracies are that consumers in the United States pay more in real estate commissions than they should, primarily because the compensation to the Buyer’s agent is set forth and “fixed” at the time that the MLS listing is entered.

This isn’t a new allegation:

The practices have been criticized and complained about for decades in scholarly articles and various investigations which have ever gone very far. The main reason given is the power of the real estate industry lobby in the U.S.

Why are things finally starting to happen?

Primarily because of the internet. In most of the rest of the world, the Buyer’s agent’s job has been replaced by the services available on the internet. This is borne out in numerous domestic and global statistics and studies. The disparities have gotten so big that they reached a “critical mass” that started the DOJ moving, and once the first class action suit was certified the dam began to break. Sitzer v. Burnett was the first of the class action suits to reach a jury verdict.

THE WALL STREET JOURNAL.

The way we buy and sell homes in the U.S. isn't normal—at least not compared with the rest of the world.

*The commission on a home sale here is typically around 5% to 6%, usually split between the seller's and buyer's agents.
In most countries, the commissions are substantially smaller.*

The U.S. is home to as many as three million agents. By most estimates, no other country is even a close second.

WSJ, Veronica Dagher, Nov. 16th, 2023

Leaders | Property wrongs

Time to take a wrecking ball to realtors' fees in America

A court case is a first step to ending a racket



IMAGE: ALAMY

Nov 8th 2023 · 3 min read

Sellers beware

Why America's real-estate brokers are such a rip-off

NEW YORK

Selling a house in the United States is extremely expensive

United States · Aug 29th 2019 · 3 min read



The
Economist

PERSONAL FINANCE

Almost No One Pays a 6% Real-Estate Commission—Except Americans

How the rest of the world buys and sells homes explained, in three charts



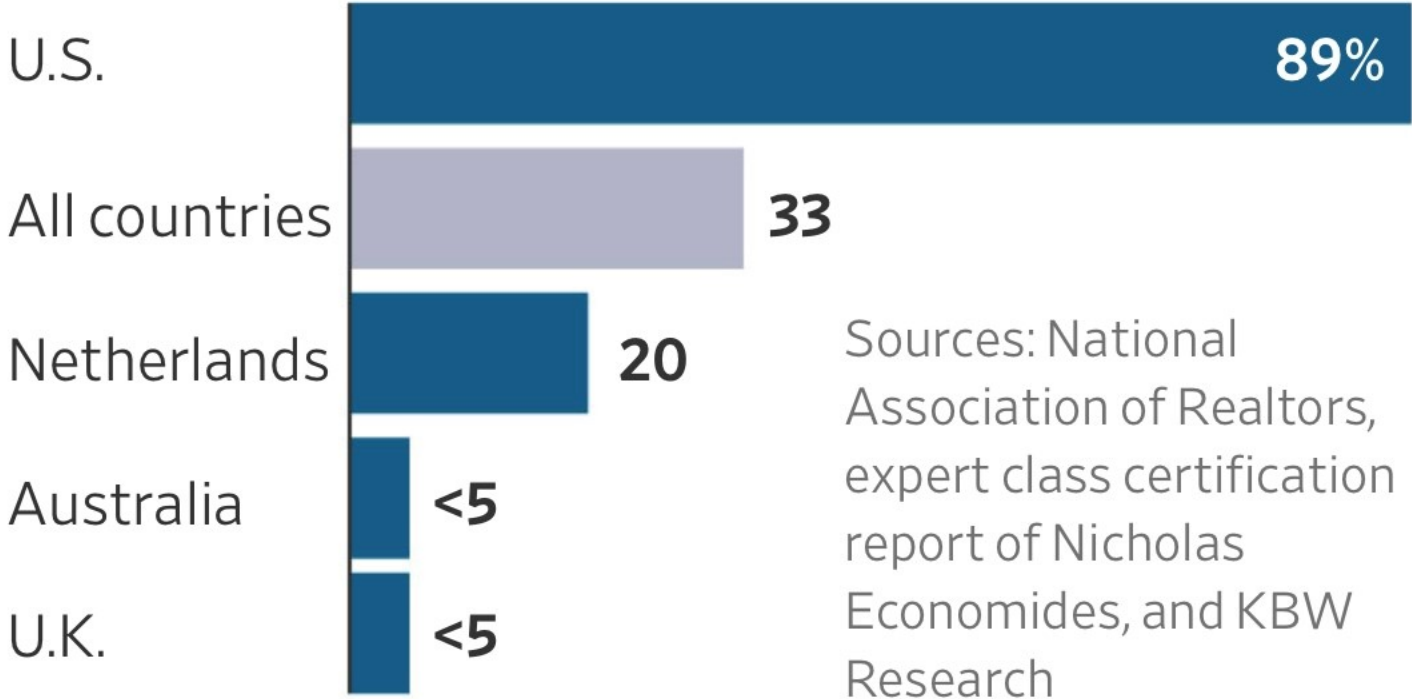
The U.S. has more real-estate agents than any other country, by a wide margin. PHOTO: GETTY IMAGES

By Veronica Dagher

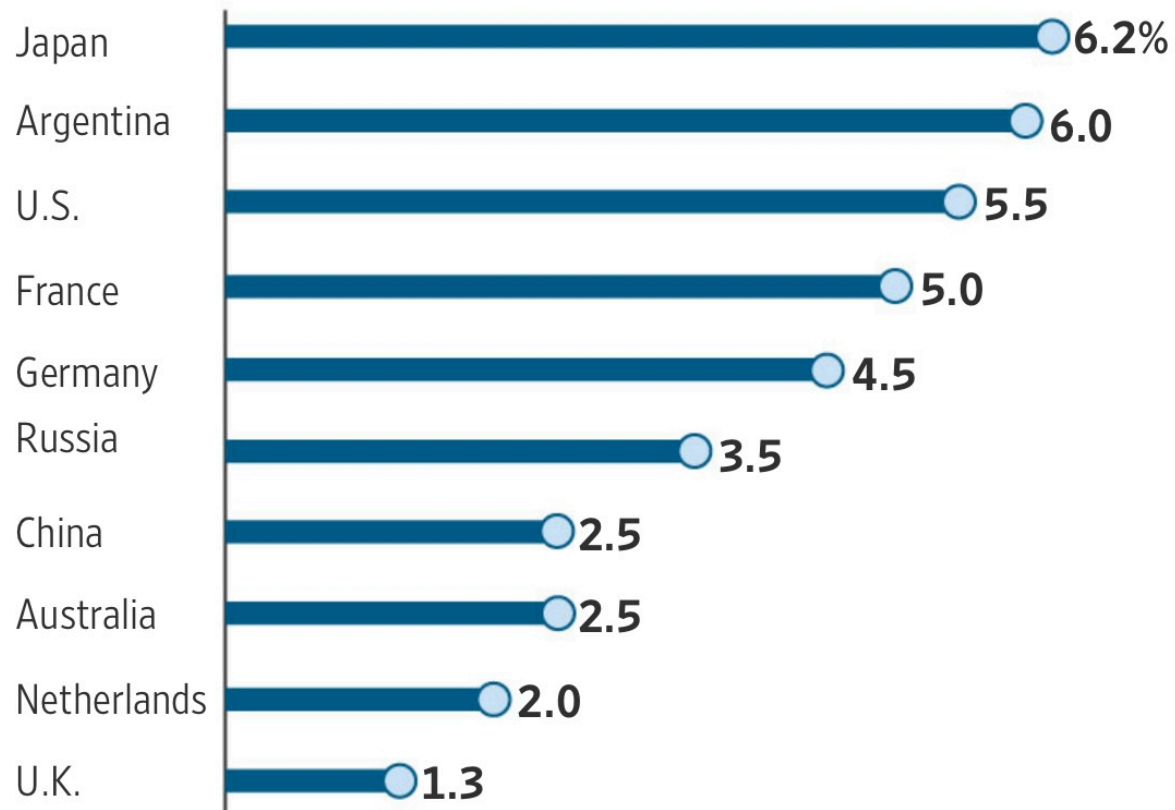
Nov. 16, 2023 at 9:00 pm ET

Buyer agents

Use of buyer agents by country



Typical brokerage commissions worldwide



Sources: Professor Norm Miller, Prof. Chad Syverson, KBW Research and Surefield

REVIEW OF THE SUBSEQUENT “COPYCAT” LAWSUITS THAT HAVE BEEN FILED



- The worst thing that can happen to you is a bunch of class action plaintiff’s lawyers figure out that they can get a class certified, get in front of a sympathetic jury, and get giant amounts of money in damages
- Difference from the tobacco smoking litigation... lots of people kept smoking and the tobacco companies could just sell tobacco products to people in other countries. These cases all include injunctions against continuing the anti-competitive practices.

HOW CHANGE HAPPENS IN AMERICA

- A Dynamic Marketplace
- Legislation
- Executive Orders
- Supreme Court Decisions

And every so often.....

- Huge class action lawsuits



Lawsuits in Florida, Texas, Illinois, California, Missouri, Georgia, SC, Pennsylvania, New York, and Massachusetts so far.

- MOEHL- Class action- trial begins in first half of 2024. Class action status granted.
- GIBSON- Against Compass, EXP, Refin, Weichert, United real Estate, Howard Hanna Real Estate, Douglas Elliman, and NAR violated Sherman Act. Damages could exceed \$200BB
- BATTON1 - in this one the plaintiffs are home buyers rather than sellers. Against NAR, Anywhere, KW, RE/MAX, Home Services of America. Motions to Dismiss pending.
- Batton 2- Filed in Chicago federal court on Nov. 2, 2023. Much larger scope than Sitzer/Burnett, Moehrl, and Gibson. Seeks certification for a Nationwide class, and Damage Class consisting of everyone who purchased residential real estate in the US on an NAR MLS anytime between Dec. 1, 1996 to date.
- MARCH: Filed 11/7/23 Home Sellers allege that the Real Estate Board of NY (REBNY) rules governing commission fees violate state and federal antitrust laws. Against REBNY and 26 real estate companies in Manhattan.
- Burton: Filed in US District Ct. in SC on 11/6/23. Against NAR and KW, class will represent home sellers across SC
- Nosalek : Allegation is that MLS Property Information Network (MLS PIN)_ adopted a policy similar to that of NAR requiring listing brokers to offer compensation to buyer agents before listing a property on MLS. Settlement reached i/a/o \$3MM and agreement that MLS PIN will cooperate in continued litigation against the other defendants- including Anywhere, RE/MAX, Keller Williams, and Home Services of America.
- QJ Team- Texas, 20+ brokerages and real estate teams. Seeking class action to sue on behalf of all home sellers in Texas that sold a home between Nov. 13, 2019 and present.
- Phillips- Georgia, similar to other copycat lawsuits alleging a nationwide conspiracy. Seeking a permanent injunction that would prevent any of the defendants from “requiring that sellers pay buyer brokers”. Class would be anyone who listed a property for sale on an MLS in Georgia and paid a buyer broker commission between 11/22/2019 and present.
- Spring Way: Pennsylvania, targeting West Penn MLS, PA Association of Realtors.
- GRACE- California- San Francisco against NAR, Anywhere, RE/MAX, KW, Compass,eXp, Bay Area Real Estate Information Services,....
- Martin- Another Texas one.- Filed 12/14/23- names over 40 brokerages and real estate associations- many of the same as named in the QJ Team Case. Class will be anyone who listed a house for sale in TX on an MLS between 11/13/19 and present.
- UMPA- US wide... class will be anyone in the US who used a real estate agent affiliated with one of the corporate defendants to sell a home listed on MLS in the past 4 years. Filed in Missouri.

And now right here in our back yard.....

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

COMPLEX BUSINESS
LITIGATION DIVISION

CASE NO:

PARKER HOLDING GROUP INC.,

Plaintiff,

v.

CLASS REPRESENTATION

JURY TRIAL DEMANDED

FLORIDA ASSOCIATION OF REALTORS, THE KEYES COMPANY, LPT REALTY, LLC, CHARLES RUTENBERG REALTY, INC., CHARLES RUTENBERG REALTY – ORLANDO, LLC, UNITED REALTY GROUP, INC, THE K COMPANY REALTY, LLC, FLORIDA HOMES REALTY & MORTGAGE LIMITED LIABILITY COMPANY, DALTON WADE, INC., AVANTI WAY REALTY, LLC, MVP REALTY ASSOCIATES LLC, FLORIDA REALTY OF MIAMI CORP., LIFESTYLE INTERNATIONAL REALTY LLC, WATSON REALTY CORP., PREMIERE PLUS REALTY CO., FUTURE HOME REALTY, INC., MICHAEL SAUNDERS & COMPANY,

Defendants.

CLASS ACTION COMPLAINT

I. INTRODUCTION

1. Plaintiff, individually and on behalf of all others similarly situated in Florida, bring this action against the Florida Association of Realtors (“Florida Realtors”) and sixteen of



Interestingly, *Parker Holding Group* was filed in STATE court, and is based on violations of the Florida Antitrust laws and the Florida Deceptive and Unfair Trade Practices Act (FDUPTA). The plaintiffs chose State court instead of Federal court for some reason...

Some Memorable Excerpts from the Parker Holding Group complaint:

“The Florida Realtors MLSs have imposed certain NAR anticompetitive rules, policies, and practices on their MLS’s. These anticompetitive rules, policies, and practices include:

- a. Designing and facilitating a process for fixing and maintaining buyer-agent commissions and seller-broker commissions by creating and maintaining a forum for the seller-broker to make an offer of compensation to buyer-agents from the sales price paid by the buyer to the seller at the time of listing the home on the MLS (which also serves as the basis for setting the seller-broker commission through the customary 50/50 split); [This is commonly referred to as the “tying” practice”]*
- b. Requiring that any seller-broker, when listing a property on an MLS, must make an offer of compensation to any buyer-agent representing a potential buyer for the home;*
- c. Requiring that the offer of compensation to the buyer-agent be a “blanket” offer- ie, the exact same compensation terms must be simultaneously offered to every buyer-agent without regard to the financial arrangements they have made with the buyer;*
- d. Prohibiting the buyer- agent from attempting to reduce the buyer-agent commission as part of any offer for purchase;*
- e. Preventing the seller from reducing the buyer-agent commission after an offer to purchase the home; and*
- f. Establishing penalties, including fines or suspension or expulsion from the MLS, for violations of these rules and creating means for reporting such violations to the MLS.”*

“The Broker Defendants and other co-conspirators have joined the Florida Realtors MLSs and participated in their governance through the boards of Florida Realtors and its local realtor associations and MLSs.”

“For the purpose of increasing their profits from artificially high commissions, the Broker Defendants have agreed to participate in, facilitate, and implement the conspiracy.”

“Within the residential real estate industry, it is standard practice to compensate brokers with commissions calculated as a percentage of a home’s sale price. As a result of the offer-of-compensation rule, the compensation structure does not follow the natural order, in which each broker would set their own commission. Rather, at the beginning of the process, the seller-broker sets the buyer-agent commission, which is paid by the seller rather than the buyer, and then sets their own commission based on the buyer-agent commission.”

“In the absence of a market intervention like the offer-of-compensation rule, buyers rather than sellers would pay buyer-agent commissions, and buyer-agents would compete with each other by offering lower commissions to prospective buyer clients. In other words, without the offer-of-compensation rule, homebuyers would contract directly and separately with their agents based on factors like price and quality of service.”

“Seller-brokers are motivated to maintain high buyer-agent commissions to attract the buyer-agents to the listing. This results in higher commissions for buyer-agents. It also leads to higher seller-broker commissions based on the customary 50/50 split.” [Steering practice]

“The Buyer is no longer participating in the competitive process, and the buyer-agent does not have to compete on price. As a result, home sellers are forced to pay inflated buyer-agent commission rates, which are baked into a higher seller-broker commission at the outset of the process by the seller-broker in the agreement with the seller.”

THE DOJ IS BACK IN THE HUNT





Search



News



PRESS RELEASE

Justice Department Files Antitrust Case and Simultaneous Settlement Requiring National Association of Realtors® To Repeal and Modify Certain Anticompetitive Rules



Thursday, November 19, 2020

- In 2019 US DOJ opened an Antitrust investigation against NAR.
- US DOJ filed a civil Antitrust Case against NAR and a simultaneous settlement in Nov. of 2020.
- They simultaneously filed a settlement of the suit.
- DOJ wants to re-open the investigation, NAR argues that they can't because of the settlement.
- US Court of Appeals in Washington, DC heard oral arguments on Dec. 1.
- NAR argues that a letter written by DOJ saying they were "closing their investigation" prevents DOJ from reopening it.
- Comments by judges made during the arguments indicate likelihood that the court will rule for DOJ.

"If I close the door, does that mean I'm never going to open it again?" said Judge Florence Y. Pan. "I'm looking at this letter and I don't see how you can read it to make any commitments about the future."

Judge Florence Y. Pan

Arguments in December before the US Court of Appeals, DC

WHAT COMES NEXT WITH BURNETT V. SITZER?

FIRST, THE RULING ON THE VERDICT

- Ruling expected this spring. Post trial motions are being submitted now.
- What the ruling will cover:
 - Any amendment of the verdict by the judge. Any amendment must be because the jury made an award that was not supported by any evidence. This is unlikely in these types of cases as the damages can be quantified fairly easily. For example, if there were 500,000 plaintiffs that on average paid 3% too much in commissions on an average home price of \$400,000 that equates to \$6BB. In Sitzer, based on the number of plaintiffs, the \$1.8BB actually seems very conservative.
 - Emplacement of an Injunction. A US District Court has the ability to implement an injunction NATIONWIDE. This is because in general, violation of a FEDERAL law and the remedies to stop that violation (the injunction), apply throughout the USA.

WHAT COMES NEXT WITH BURNETT V. SITZER?

SECOND, APPEAL?

- Appeal bond of 1.2-1.5 times the amount of the verdict must be posted.
- Posting an appeal bond is risky! Why?
 - If you lose, there is no maneuvering. The money gets paid immediately to the plaintiffs.
 - How are you going to finance an appeal bond? No one is going to loan you the money if they think you'll just file bankruptcy if you lose, which is what would happen.
 - NAR's total assets are about \$558MM. All the defendants added together, including RE/MAX and Anywhere Real Estate (who settled), add up to less than \$2BB, still WAY short.
- How long could an appeal take? Generally between 6 months and possibly as long as 2 years.

WHAT COMES NEXT WITH BURNETT V. SITZER?

THIRD, POSSIBLE RESULTS OF AN APPEAL:

- Best case scenario for the Defendants is a Re-trial.
- Most commonly cited “trial error” in the case is the “Ambush Video” that was shown to the jury showing the Home Services CEO in a training session basically telling Realtors to threaten sellers with steering if they don’t pay a high enough commission.
- What would be different? It took the jury less than 30 minutes to decide that the practices alleged in the complaint were anti-competitive in violation of the laws.

WHAT COMES NEXT WITH BURNETT V. SITZER?

Conclusions:

1. Doesn't seem to be any obvious way that the defendants will be able to post an appeal bond, except in the unlikely case that the judge dramatically reduces the verdict amount.
2. The industry has been defiant, stating very publicly that it will be "business as usual". **Strong possibility of a nationwide injunction against the Clear Cooperation Policy.**
3. IF an appeal is made, very difficult to see how anything will change. The defendants will be back before the same judge, with a jury picked from the same area, hearing pretty much the exact same case, with the exact same evidence.

Any Possibility of Salvation?

1. The Anti-Trust laws could be changed through action by congress to allow for a specific Realtor® exemption. NAR and the rest are a powerful lobby, but still very unlikely.
2. Juries in a Sitzer re-trial and the other lawsuits coming could reach a very different conclusion. Again.... Not likely.
3. Do away with Trial by Jury in Anti-Trust cases? It's been a scholarly debate for a long time, but very unlikely to happen.

AFTER THE DUST SETTLES.... A NEW WORLD IN REAL ESTATE





What will the new world look like for:

Realtors®?

- Everyone is going to want to be a listing agent.
- New Normal- Listing Agent handles both sides of the transaction for just the listing commission.
- Realtors® will still act as Buyer's agents sometimes, primarily when they get a referral. Would you turn down a referral?
- Less Buyers will seek a Buyer's Agent if they know that they have to pay for it
- Buyer's Agents will have to negotiate their compensation directly with the Buyer
- Buyer Agent Representation Agreements will be 100% necessary if you want to be paid
- Brokers will see their income cut in half
- Not everyone will survive
- Many brokerages will have to file for bankruptcy protection

WHAT CAN YOU DO TO PREPARE?



- If you truly believe that the predictions in this presentation are wrong, and it's going to be "business as usual", then don't do anything! "Don't look up!"
- However, if you think that there is a decent possibility that at some point not too far in the future, Buyers will have to pay Buyer's agents directly, and the Clear Cooperation Policy will essentially be outlawed.... Then:
 - How will you pivot? Strong listing agents will want to strengthen their fortifications.... Lots of former Buyer's Agents will be coming after your business.
 - As a Listing Agent you are going to be doing twice the work for the same amount of money. How can you become more efficient? How will you handle being a transaction agent pretty much every time now?
 - Listing Agents- no more "steering" help in the negotiations for your listing fee. Be prepared for tough negotiations.
 - How will you handle it when a Buyer gets the feeling that they need someone looking out for their interest?
 - If you are a Buyer's agent- you have a lot of thinking to do. Will you try and adopt a new fee-for-service model? How will you advertise? What will you charge? When will you get paid?
 - When Buyer's learn that they have to pay for a Buyer's agent, how will they react? How will they get advice and assistance? They'll probably learn pretty quickly that they can get it for free from the Listing Agent!
 - If you are a broker the bottom line is that about half of your income is going to disappear.
 - Check in with your E&O Carrier. There is a possibility that there will be "clean up" lawsuits that go after big agents also.
- What else?????

The Bottom Line

- **If anyone is telling you, “Don’t worry, it’s just going to be business as usual”. That’s probably not very good advice. You might want to “Look up”.**
- **There is a very decent chance that as early as this spring there will be a nationwide injunction against the continued use of the Clear Cooperation Policy™.**
- **It is very likely that the combination of the damage verdicts and the injunctions will eliminate the Clear Cooperation Policy™ within the next 2 years.**



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The advertisement features a tablet held by a person, displaying a user interface with a large blue box containing the text '\$7,238/yr In Savings Found!'. The background of the tablet shows a scenic view of a house and a pool. The overall design is clean and professional, with a focus on the guaranteed savings.

www.propertytaxprotection.com