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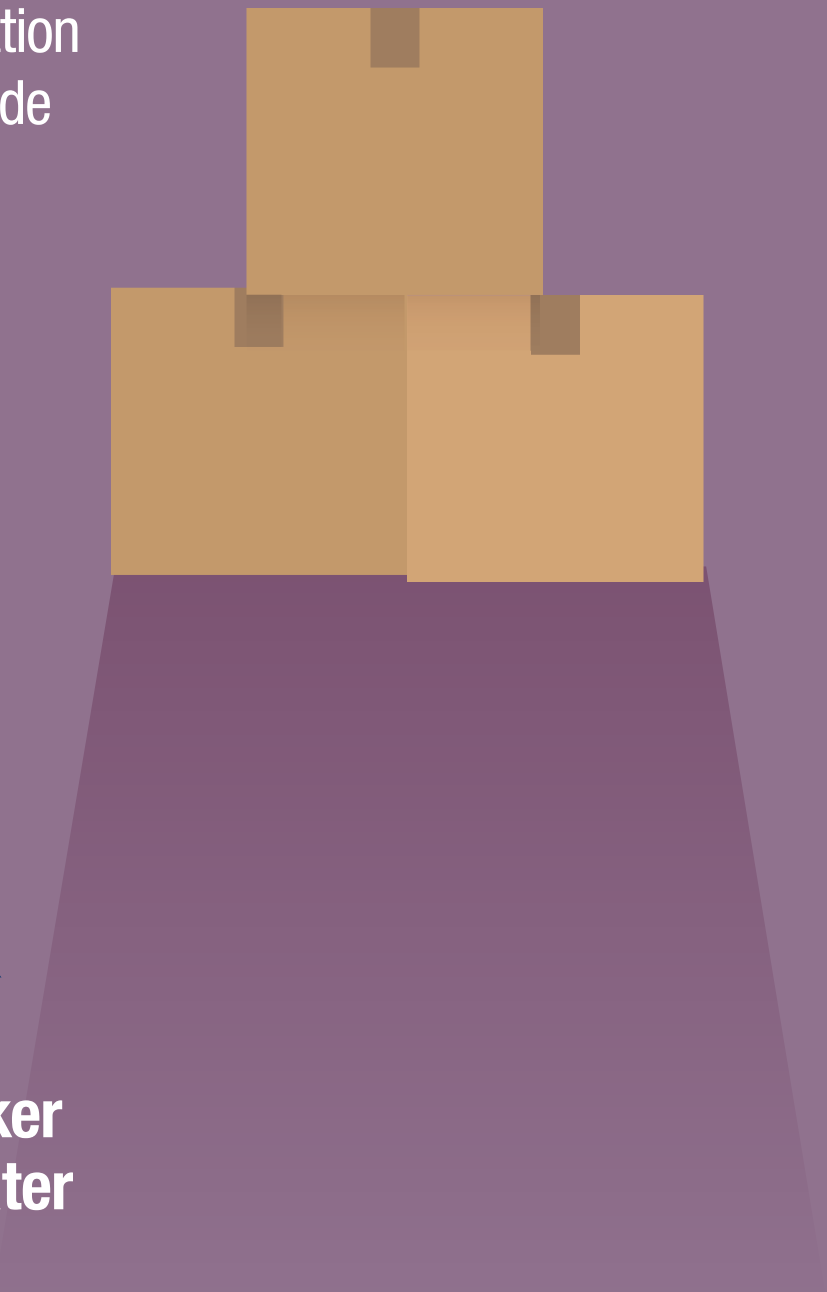

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Turning the Tables

The State of the Buyer Broker Commission Rule a Year Later

By Zachary Pyers, Marissa A. Kuryla, and Kenton H. Steele

Once a dominant force within the real estate community, the rule has become obsolete.

Plan Revisiting The Real Estate Commission Controversy

A year ago, a case out of Missouri sought to threaten the existence of the Buyer Broker Commission Rule. The rule, implemented by the National Association of Realtors (the "NAR") in 1996 has historically drawn controversy because of its fee splitting nature between the buyer and seller's brokers. All brokers and agents involved in the sale charged and split a 6% commission fee regardless of the sale price. This rule has had a massive impact on the real estate market by allowing brokers to receive sizable commissions, even on smaller sales. Additionally, the rule had the effect of placing the obligation of payment of the entire commission on the seller. So despite the popularity of the rule among brokers who do not have to worry about adjusting their rates based on sale prices or market conditions and homebuyers who do not have to pay their broker's commission fee, home sellers have typically taken issue with the arrangement.

This has given rise to a number of litigated actions against the NAR and real estate companies that utilized the rule. Particularly, the controversy stemmed from whether the NAR's rule dictating that brokers and agents charge and split a set commission fee violates Federal Antitrust laws. While several courts historically held this practice did not violate Antitrust laws due to the organizational structure of the real estate market, more recently courts have begun to reconsider.

In October of 2023, in an unprecedented decision, the longstanding rule finally met its match when a Federal Court in Missouri held the commission structure violated Antitrust laws since it restrains free market competition and trade. Now, a little over a year later as part of its settlement terms, the NAR has completely done away with the rule. Once a dominant force within the real estate community, the rule has become obsolete.

Burnett v. National Association of Realtors (2022)

In 2019, a certified class of homeowners in Missouri brought suit against the NAR alleging the Buyer-Broker Commission rule violated Section 1 of the Sherman Act which prohibits price fixing. *Burnett v. National Association of Realtors, 2022 U.S. Dist. LEXIS 226614, 13-14 (W.D. Mo. 2022).* Under the Sherman Act, price fixing is defined as an agreement, whether express or implied, between competitors to fix prices or wages in a particular industry.

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There are two types of price fixing, vertical and horizontal. While vertical price fixing involves an agreement to set prices between entities at different levels of the market, horizontal price fixing involves a conspiracy between competitors at the same market-level. The Buyer-Broker Commission rule falls comfortably under the scrutiny of horizontal price fixing given the commission sharing between brokers occurred at the same level.

To establish a claim under Section 1 of the Sherman Act, a plaintiff must demonstrate:

(1) that there was a contract, combination or conspiracy;

(2) that the agreement unreasonably restrained trade; and

(3) that the restraint affected interstate commerce. Burnett, 2022 U.S. Dist. LEXIS 226614, 16. To establish the first requirement, courts look at direct evidence of an agreement or conspiracy as well as circumstantial evidence that tends to prove that there was a conscious commitment to a common scheme designed to achieve an unlawful objective. *Nosalek v. MLS Prop. Info. Network, Inc., 2022 U.S. Dist. LEXIS 180409, 206 (Dist. Mass. 2022).* To establish the second requirement, courts employ one of two different analyses depending on the circumstances of the particular case. *Hyland v. HomeServices of America, Inc., 771 F.3d 310, 318 (6th Cir. 2014).* When facing allegations of horizontal price fixing, the courts will find the restraint unlawful per se if it finds that such price fixing exists. Id. These types of restraints are deemed unlawful per se due to their predictable and pernicious anticompetitive nature. Id.

A competing narrative has gone in the opposite direction: Under the new commission structure, buyers will realize they're on the hook for thousands and decide not to use agents at all.

In Burnett, the plaintiffs argued that the commission structure was unfair to home sellers in that it forced them to pay an inflated commission price due to the commission sharing nature between the buyer's and seller's brokers. In other words, the rule's effect is that sellers have to pay a commission fee to the buyer's broker that they would not ordinarily pay absent the rule. The Court found ample evidence of a conspiracy to commit price fixing and denied the defendants' motion for summary judgment. The case made it all the way to a jury trial where, in October of 2023, the jury returned a verdict for the plaintiffs. The jury found that even if the commissions were negotiable, the seller was still obligated to pay, thus restricting price competition.

The defendants were found liable for $1.8 billion for conspiring to keep commissions artificially high. In a somewhat shocking turn of events, on March 15, 2024, the NAR announced that it would settle the lawsuit rather than appeal the verdict. As part of the settlement, the NAR agreed to change commission structures and pay back $418 million over four years. The judge presiding over the case granted preliminary approval of the settlement on April 23, 2024. A deadline of July 2024 was set for practice changes, which was later moved to August 17, 2024. And as of August 17, 2024, the rule is officially no longer in effect. While the settlement that resulted in these changes was ultimately given final approval by the court in November of 2024, this approval was followed by a flurry of appeals. These appeals from plaintiffs who objected to the settlement approval on the basis that it did not adequately resolve the issue of the commission structure create uncertainty as to whether the legal fight on this issue is truly over. However, the industry has moved forward in changing the commission structure while the appeals play out.

Commission Structure & System Going Forward

Under the new system, the most significant change is how buyers' agents are paid. While the seller can choose to pay a buyer's agent, the rules make it clear that sellers are no longer required to offer any compensation to a buyer's agent. *Goll, David, New Real Estate Commission Rules to Roll Out Aug. 17: Here's How Selling and Buying a Home Will Change, Palo Alto Online, August 15, 2024,* ***https://www.paloaltoonline.com/real-estate/2024/08/15/new-real-estate-commission-rules-to-roll-out-aug-17-heres-how-selling-and-buying-a-home-will-change/#:~:text=What%20the%20changes%20mean%20to,asking%20them%20about%20their%20services***. Buyers will now be required to negotiate directly with their own agents and must enter into signed agreements that outline how the buyer will compensate their agent, (flat fee, hourly rate or other arrangements), the amount they will pay, and what services they want their agent to provide. Written agreements will be required before a buyer and their agent can do any in-person or live virtual home tours. Buyers do not need a written agreement if they are just speaking to an agent at an open house or asking them about their services. For consumers, the new structure in general offers a greater level of transparency compared to the old model — homebuyers now will be fully aware of how much they're paying for an agent's services.

There are also changes to how and where real estate professionals may communicate with each other about offers of compensation. These offers are no longer allowed on Multiple Listing Service platforms, which are private databases created, maintained and paid for by real estate professionals and provide property listings to Zillow, Trulia, Realtor.com and others. An important aspect of the new model for agents: While the new rules prevent listing agents from posting buy-side commissions on the MLS, as they used to, sellers and listing agents still can agree on the amount off the MLS. Ostrowski, Jeff and Petry, Michelle, What the Real Estate Commission Changes Mean for Homebuyers and Sellers, Bankrate, February 12, 2025, ***https://www.bankrate.com/real-estate/real-estate-commission-changes/***. It means it's fine to offer compensation amounts verbally, in emails or texts, and even on their brokerage's own website, as long as it's not done on the MLS.

Predicted Effects on the Real Estate Market & Consumers

Early on after the death of the commission rule, one narrative predicted a utopia for homebuyers: A price war will erupt, and commissions will plunge amid a new wave of competition among buyers' agents. Ostrowski, Jeff and Petry, Michelle, What the Real Estate Commission Changes Mean for Homebuyers and Sellers, Bankrate. Some foresee a near-nirvana for consumers: Vishal Garg, CEO of mortgage company Better, predicts the settlement will ultimately unleash a "buy-side price war" — buyer agents will begin competing fiercely for clients. "In the best-case scenario, consumers are going to shop around for buy-side agents in the same way they shop around for mortgage lenders," he says. Others also believe the rule changes will be good for the real estate market. With sellers in certain areas now looking at paying a commission of only 2.5% to 3.5% on any given transaction, this could persuade more long-time homeowners to sell their homes that could put more badly needed housing inventory onto what has been a historically tight market in recent years. Goll, David, New Real Estate Commission Rules to Roll Out Aug. 17: Here's How Selling and Buying a Home Will Change, Palo Alto Online. This new situation results in something that is fairer to the seller.

A competing narrative has gone in the opposite direction: Under the new commission structure, buyers will realize they're on the hook for thousands and decide not to use agents at all. These people fear a darker turn. Ken H. Johnson, a real estate economist at the University of Mississippi and a former real estate broker, says the new rules add another layer of complication to an already-confusing process. "No longer advertising buyer-agent commissions will only create a more confused and drawn-out transaction process, as buyers, sellers and agents will have to negotiate the fee, who will pay for it and how much will be paid by each party," Johnson says. "Due to this added level of complexity, buyers will almost certainly have to negotiate with more sellers before they find the deal they are satisfied with. Thus, the house-hunting period will extend for the average buyer," he said. Many in the real estate industry worry that first-time homebuyers in particular — those who need expert guidance the most, and who are already severely hampered by high prices and high mortgage rates — will be priced out of professional representation. If commissions no longer come out of the seller's proceeds, the thinking goes, buyers won't have an additional $10,000 to pay an agent.

The NAR, meanwhile, has portrayed the changes as minor tweaks rather than a major shift. And as of early 2025, it appears the NAR may have been correct as the effects look fairly muted.

Legislative Impacts & Advice to Clients

The California Legislature is currently considering a bill that would require written agreements between agents and homebuyers. It would enshrine the requirement in state law, complementing the new industry directives. Mantill Williams, Washington, D.C.-based vice president of communications for the NAR, said 18 states currently have such laws, with several more, including California, now proposing similar legal requirements. Assembly Bill 2992, authored by Assembly member Stephanie Nguyen, D-Elk Grove, would mandate buyer/broker written agreements — already required for sellers and brokers. The bill is still working its way through legislative committees.

Given these changes, it will be important to advise clients in the real estate community, including brokers, buyers, and sellers, of what these changes could mean for them. And with these changes in tow, it's important to keep in mind the potential for new legislation in your jurisdiction requiring written agreements between agents and homebuyers.