

AntitrustConnect Blog

If I Were You...I'd Listen to this Podcast about Residential Real Estate & Antitrust

Molly Donovan and Aaron Gott (Bona Law) · Friday, April 5th, 2024

This Episode Is About: Residential [Real Estate](#) and Antitrust

Why: A settlement has been reached between the National Association of Realtors (or NAR) and the class action plaintiffs that would resolve [the \\$1.8 billion verdict out of Missouri finding illegal collusion in the residential real estate industry](#). But the settlement raises its own antitrust concerns and this podcast provides actionable guidance for avoiding them. [You can listen to this podcast here.](#)

Some Background: The Missouri case focused on the NAR's mandatory commission rule requiring the home seller to pay a non-negotiable commission to the broker representing the buyer. Plaintiffs alleged this resulted in a complete lack of competition for buy-side rates—which were artificially inflated. Before this lawsuit and copycat suits, virtually all brokerages in the industry operated under the rule and were aware that everybody else was operating in the same way.

But under the settlement, the NAR has agreed to implement a new rule prohibiting offers of buy-side compensation to be posted on the MLS (or multiple listing service, where most homes are listed for sale). Individual brokers can pursue buy-side commissions, but only off the MLS through negotiations. Assuming the settlement is approved, this change will go into effect in mid-July 2024.

Here's what brokerages and local real estate associations need to know:

Bullet #1: Collusion often takes place after major industry disruptions like this one. Competitors panic and seek comfort in knowing how others in the industry plan to cope – we could call them “crisis cartels.” In this case, brokerages who are supposed to be competing should not discuss with one another how they plan to react to the eradication of the mandatory commission rule. Each brokerage should determine by itself how it will compete, what commissions it will seek, and from whom.

Bullet #2: Brokerages need to ensure that there isn't a reversion back to a *de facto* mandatory commission rule. While some commentary suggests that disclosing to sellers and buyers that commissions are negotiable may be enough, we think that, in addition to disclosures, there must be an accessible process that prompts and facilitates bona fide arms-length negotiations over commissions. Commission negotiations should not be discouraged in any way. Disclosures to

home sellers and buyers that commissions are negotiable should be understandable, easy to find and accompanied by an explanation of the actual process for negotiating.

Bullet #3: Buy-side commissions should be commensurate with the “value add” brought by the buy-side broker. This may require detaching the buy-side commission from the sale price of the home and documenting the rationale behind the final rate chosen. This shows that the rate is competitive and not an “industry-standard” or “fixed” commission.

Bullet #4: No steering. Buy-side brokers should present to clients, equally and fairly, all homes that fall within their specifications. And conversely, sale-side brokers should treat all offers equally notwithstanding commissions. Brokerages must be careful not to steer clients towards dealing with other brokerages that are known to “cooperate” with respect to commission sharing, and must not steer clients away from dealing with brokerages that are “uncooperative,” i.e., taking a unique approach to competition for clients.

Bullet #5: Brokerages should disconnect from local NAR groups that require adherence to anticompetitive rules in exchange for access to the MLS, or brokerages should negotiate new membership terms with their local NAR group. Like all trade associations, the benefits of involvement in the NAR and local realtor associations can be [overshadowed by antitrust risk](#).

Ultimately, whether in a trade association or not, brokerages should approach antitrust compliance independently rather than follow the NAR’s rules automatically.

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