BROKERAGE

Bombshell multibillion-dollar commission suit now a class action

A judge on Wednesday granted class certification in a federal commission suit that could rock the real estate industry and impact how agents are compensated nationwide

Image by Jenosch / Shutterstock.com

BY ANDREA J. SUDHAMI
Today 3:31 P.M.

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In a serious blow to the National Association of Realtors and major real estate franchisors, potentially millions of homeowners can now be reimbursed for billions in commissions they paid to buyer agents under a class action ruling and a court order issued by a federal court ruling on Wednesday.

Judge Andrea R. Wood of the U.S. District Court for the Northern District of Illinois has granted class certification in the larger of two federal commissions lawsuits that could rock the real estate industry and impact how agents are compensated nationwide. The suit is known as Moehrl after its lead plaintiff, the smaller of the two suits, known as Sitzer/Burnett, got class certification nearly a year ago.

In March 2019, homebuyer Christopher Moehrl filed a federal antitrust suit against the National Association of Realtors and real estate franchisors Anywhere (formerly Realogy), HomeServices of America, RE/MAX and Keller Williams.

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The suit, which has been a bombshell from Day 1, alleges that some NAR policies — including one requiring listing brokers to offer buyer brokers a commission in order to list a property in a Realtor-affiliated multiple listing service — are anti-competitive and violate the Sherman Act, which carries a hefty sum: a treble damages award, which means the suit could be worth $1.5 million multiplied by three.

The plaintiffs' motion for class certification relies on the opinions of two experts, NYU economics professor Nicholas Economides and Harvard law professor Einer Elhauge. The defendants tried to exclude their testimony from the case but Wood denied that request as part of Wednesday's ruling.

Economides has estimated that total class damages in the case come to $13.7 billion. If the court awards treble damages, that figure could go to $41.1 billion.

Judge Andrea R. Wood

"At issue in this case are the standardized rules promulgated by the NAR and then adopted by Corporate Defendants, which, in turn, enforce those rules against their affiliated brokers throughout the nation," Wood wrote in her order.

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"Plaintiffs' evidence includes Defendants' own policies and representations that reflect how the NAR and Corporate Defendants exercise their authority over the members of the MLS Rules, Code of Ethics, and Case Interpretations. Plaintiffs also highlight evidence showing how various senior executives from each Corporate Defendant have personally involved in the NAR's governance.

"That evidence regarding Defendants' conduct in joining and advancing a single agreement is undoubtedly common across the class, and the existence of the alleged conspiracy will be one of the predominant issues in the litigation.

"The Court concludes that Plaintiffs have shown the existence of common questions concerning antitrust impact that can be answered with common evidence such as Elhauge and Economides's expert opinions."

Wood's ruling certifies two classes in 20 MLS markets nationwide, the first of which seeks monetary damages and the second of which does not seek such damages but asks for an injunction barring the defendants from continuing to violate antitrust laws by maintaining and enforcing the challenged NAR rules:

1. "Home sellers who paid a commission between March 6, 2015, and December 31, 2020, to a brokerage affiliated with a Corporate Defendant in connection with the sale of residential real estate listed on a Covered MLS and in a covered jurisdiction. Excluded from the class are (i) sales of residential real estate for prices in excess of $500,000, (ii) sales of residential real estate at auction, and (iii) employees, officers, and directors of defendants, the presiding Judge in this case, and the Judge's staff."
2. "Current and future owners of residential real estate in the covered jurisdictions who are prospective buyers, and who have the intent and ability to purchase a home listed on a Covered MLS. Excluded from the class are (i) sales of residential real estate for a price below $56,500, (ii) sales of residential real estate at auction, and (iii) employees, officers, and directors of defendants, the presiding Judge in this case, and the Judge's staff."

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In her order, Wood left the door open for HomeServices to narrow one or both of the classes through a separate motion requesting that the class definitions exclude unnamed members whose listing agreements contained an arbitration provision.

Wood appointed plaintiff Christopher Moehrl, Michael Cole, Steve Durrett, Jack Ramey, Daniel Umpa, and Jane Shak as class representatives and law firms Milberg Tillman Sellers & Tell PLLC, Hagens Berman Sobol Shapiro LLP, and Susman Godfrey LLP as co-lead class counsel.

"We are disappointed in the decision," NAR spokesperson Mantell Williams told Inman in an emailed statement.

Mantell Williams

"Pro-competitive, pro-consumer local MLS broker marketplaces ensure equity, efficiency, transparency and market-driven pricing options for homebuyers and sellers. The practice of the listing broker paying the buyer broker's compensation saves sellers time and money by having as many buyer brokers participating in that local marketplace and then passing a share of buyer fees to sellers.

"For buyers, these marketplaces save them the burden of extra costs at closing, enable them to receive professional representation and make homeownership possible for more people. In fact, the U.S. model of independent, local broker-to-broker cooperation is widely recognized the best value and most efficient model in the world, with no hidders or extra costs and with more complete, verified information compared to other countries."

RE/MAX declined to comment for this story. Inman has reached out to HomeServices, Anywhere, and Keller Williams for comment and will update this article if and when we hear back.

Editor's note: This story has been updated with information from the judge's order.

Email Andrea V. Brambila.

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TOPICS: Anywhere | commission | Keller Williams | MLS | NAR | RE/MAX | Realogy | realtors

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Andrew Sisser · 1 month ago
Wow, what a concupiscent. Still, no merit to the plaintiffs case. And for many of us Exclusive Buyer Brokerages we had correct language that the seller paid no brokerage commission need to ok by our Buyer Clients on their behalf. Not fine on MLS co-op.
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Anthony Phillips · 1 month ago
Wow, the NAR rules on pricing a commodity of laws and that decoupling commissions as Buyers and Sellers pay their agents direct and bring price competition, claiming Consumers will save up to $500 a year.

Plaintiffs are "sisters" in scam, unfortunately, however, CONSUMERS SAVE DOLLARS, NOT PAYER, so aggregate fees are the correct metric. Moreover, they tell to factor in home values and currency considerations in "comparable foreign markets"

Singapore map offers 3% "rebate", however their average home is $1 Bn creating a $40,000 commission.

Stephen Brobeck, from the Consumer Federation ... See more
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Jeff Raabe · 1 month ago
LM oh, ...here we go!
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Ray Ney · 1 month ago
Anti-trust laws states " including one requiring listing brokers to offer buyer brokers a commission in order to list a property in a Realtor-affiliated multiple listing service — violate the Sherman Antitrust Act by eliminating seller costs." so...are they saying that what was done was legal? Or are they saying that what was done was illegal but that the new organizations cannot agree to set sale conditions, here? when required by the MLS and NAR
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David Mamaduhna · 1 month ago
Ray Ney, I have no clue to answer. All of our commissions are negotiable (at least that is full law). AND you can sell your house with no agent involved. Why would a seller agree to hire a Realtor or pay a Realtor - by definition commission is a fee that is negotiated between the seller and the Realtor. Buyer agents are free to do the same. The law doesn't like by the numbers, you can negotiate with commission. How does ANYONE think these people were "forced" to pay anything to anyone when everything is negotiable?
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Ray Ney · 1 month ago
An ad agent who is very pro buyer agency and against dual agency...I always tell sellers should pay for their own representation and buyers there.
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Linda Allen Taylor · 1 month ago
I've represented a lot of FHA buyers that would disagree with you. DPA aren't created because Buyers ACTUALLY have SAN holden in a mattress to pay their Agent with.
Like · Reply · 0 · 1 hr

Steve Brobeck · 1 month ago
Thanks, Andrew Chen, the buyers has correct get tacked onto the mortgage amount, so the buyers will not be happy about coming up with extra cash to pay Ray Ney.
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Jorge Morejon · 1 month ago
Andrew Chen, I don't even come up with the closing cost and downpayment in this environment. This would be horrible for the industry
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JP Hudlow · 1 month ago
This will go nowhere. This always happens when when the mainstream media stirs up disputes and victimization.
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Tom Wolf · 1 month ago
What in the world does this have to do with mainstream media? This is a suit against the industry by people who are not in the industry and are represented by literally two sets to do with the media, other than the fact that they are reporting on the facts of the case. I'm not a fan of the NRAR either, but this whole idea that this is a "victimization" of an idea that agent with anywhere in the realtor tech is getting ridiculous.
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Ken Johnson · 1 month ago
This is a classic case of someone looking at what someone else is making and saying, "I want that!" Yes, the buyer broker commission is paid by the seller when you sell your house or the MLS. I think it is funny that Sellers are complaining and thing the sale price is the Buyer paying the fees by paying the property. Not one buyer in the suit is claiming that they paid the fees. Buyers are not paying the fees. Sellers are complaining that in most cases the Seller would not be able to pay without the sale of their home. Should we use Walmart or Target for raising the price of products to pay for their cost of operations and profit? Or any other company? This is a ridiculous lawsuit.

Dont let your house and dirt rather a commission and you will get your home for $0? Very because no one will want to help you. Some people are stupid.
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Jim Ray · 1 month ago
Here's the tree to join silly Realty. Agents average well over 30% net, control their own business and make more money per sale than any other career. Get started now at 888-632-8888 if you are interested. Many more new Managers and agents before its too late. The big box brick and mortar companies are already in trouble, imagine what will happen if this lawsuit hits.
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Julie Hinman · 1 month ago
Not a place to troll for agents.
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Carol Bell Prosek · 1 month ago
really? that is your response?
Like · Reply · 0 · 1 hr

Claudia Haupt · 1 month ago
Why is it a place to join silly? How is silly Realty immune to the issues brought forth? Also - using this discussion to recruit agents seems inappropriate - "before its too late"...
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Ken Cantrell · 1 month ago
Depending on your area, Military Veterans may or may not be a big part. Unfortunately, the Veteran Buyer is NOT allowed to pay a Buyer agent fee, the Veterans Administration the Veteran Buyer is NOT allowed to pay a Buyer agent commission. It is an old rule based on (at the time) "the buyer does not need an agent, the MLS information is available to everyone". Because of this rule, Veteran Buyer agents fee allows for a real fee the VA buyer is have representation and still use a VA Loan.
Besides that the Seller should negotiate the listing fee with the agent. The listing agent should be willing to negotiate the fee because the Buyer agent is bringing the buyer to the problem? The listing agent really isn't paying the buyer's agent, he pays the ceiling brokerage, the listing brokerage has a Brokerage Fee Agreement and pays the buyer's agent.
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Anthony Phillips · 1 month ago
Kendall, of the dec-class action lawsuits, three claimed the Seller paid, which Judge Andrew Wood agrees, and three claimed the Buyer pays, which is the "scam" and "victimization" claim. Both Sellers and Buyers and Sellers can negotiate favorable net proceeds in multiple ways.
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Kevin Cantrell · 1 month ago
Depending on your area, Military Veterans may or may not be a big part. Unfortunately, the Veteran Buyer is NOT allowed to pay a Buyer agent fee, the Veterans Administration the Veteran Buyer is NOT allowed to pay a Buyer agent commission. It is an old rule based on (at the time) "the buyer does not need an agent, the MLS information is available to everyone". Because of this rule, Veteran Buyer agents fee allows for a real fee the VA buyer is have representation and still use a VA Loan.
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Anthony Phillips · 1 month ago
Landman an open "Sir anti-trust lawsuit is progressing through the courts and could materially impact how real estate agents receive compensation.

It appears that plaintiff and plaintiffs counsel's goal is to force buyers to pay buyer agents directly (out of pocket) versus the buyer absorbing fees into a mortgage.

Claims assert that the seller is harmed when a selling agent shares their commission with a buyer's agent. The claim is nonsensical because the sellers have the same goal, and the seller has committed to paying a fee to achieve that NET PROCEEDS goals. Seller agents get ... See more
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Michael Landman · 1 month ago
Gary Ney, no matter how much you want to "justify" the existing system the truth is it stands in our industry and as you is going to find it to be so. Now that the class has been certified the game is over. Sure NAR will appeal. And it will lose. So a new and better system will come to show it to the world. Stop arguing and start adapting.
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Patty Mile Lafarte · 1 month ago
Bad technically the LISTING BROKERAGE pays the buyer's brokerage for bringing the buyer. So the seller is only agreeing to pay the listing brokerage ofc. Buyer's agent gets paid by the buyer. The listing brokerage gives a percentage to the listing brokerage for their offer something to the buyer's brokerage or they can reduce the price of their home by the same amount or anywhere in between. The buyer's brokerage can also reduce their commission more cash to closing is offered. The Sellers will not the same for you free to Spend if they don't believe this will change the Seller's situation one bit - buyer's agent should Pay Ney.
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Victor Lund · 1 month ago
LOOK AT COMMISSION NET SHEETS - the lawyers in this case defending the industry really misunderstand real estate. They are only looking at MLS data, and being misleading. Look at the commission net sheets - agents are discounting their commissions at the closing table every day - which is evidence that the buyer knows that their commission is negotiable.
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