

# FAQs: Antitrust Lawsuits and Real Estate Commissions in Wisconsin

## Updated March 18, 2024

### Antitrust lawsuits

#### 1. What is the *Sitzer/Burnett v. National Association of REALTORS®* (NAR) lawsuit about, and what was the jury's verdict?

In the class action case of *Burnett v. NAR et al*, the plaintiffs claimed NAR's "participation rule" led to artificially fixed and inflated commissions, and increased buyer costs and home prices. The jury found NAR and the other defendants engaged in a price-fixing conspiracy and awarded \$1.785 billion in damages to the plaintiffs. Damages are automatically trebled in antitrust cases, making the total amount of damages \$5.4 billion. Two defendants settled before the jury verdict. A third defendant settled in February 2024.

#### 2. Did NAR settle the *Sitzer/Burnett* case?

Yes. On March 15, 2024, NAR announced it has reached a proposed settlement agreement that would end the litigation relating to federal antitrust conspiracy claims brought by home sellers.

The information below provided by NAR President Kevin Sears is a summary of the key settlement terms. A copy of the full statement can be found on the NAR webpage [Fostering Consumer-Friendly Real Estate Marketplaces](#).

- **Release of liability:** The agreement would release NAR, all state/territorial and local REALTOR® associations, all association-owned MLSs, and all brokerages with a NAR member as principal that had a residential transaction volume in 2022 of \$2 billion or below from liability for the types of claims brought in these cases on behalf of home sellers related to broker commissions. Despite NAR's efforts, agents affiliated with HomeServices of America and its related companies — the last corporate defendant still litigating the *Sitzer/Burnett* case — are not released under the settlement, nor are employees of the remaining corporate defendants named in the cases covered by this settlement.
- **Compensation offers moved off the MLS:** NAR has agreed to put in place a new rule prohibiting offers of compensation on the MLS. Offers of compensation could continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals. And sellers can offer buyer concessions on an MLS; for example, concessions for buyer closing costs. Effective mid-July 2024.
- **Written agreements for MLS participants acting for buyers:** Agreed to require MLS participants working with buyers to enter into written representation agreements with their buyers. Effective mid-July 2024.
- **Settlement payment:** NAR would pay \$418 million over approximately four years. NAR's 2024 membership dues will not change because of this payment.
- NAR continues to deny any wrongdoing.

**3. Has a lawsuit been filed against the Wisconsin REALTORS® Association (WRA)?**

No. Currently, the WRA is not a defendant in the *Sitzer/Burnett* lawsuit nor any other case.

**4. Do individuals have liability as members of the WRA and NAR, or because they are affiliated with any of the franchise defendants?**

No. The *Sitzer/Burnett* defendants are franchises and NAR corporate entities, respectively. The plaintiffs did not sue and are not seeking damages from individual REALTORS®.

**5. What are the next steps in the *Sitzer/Burnett* lawsuit?**

The judge has not yet issued a final order, which is expected to be issued in March or April 2024. According to NAR's March 15, 2024, statement, agents affiliated with HomeServices of America (HomeServices) and its related companies are not part of the settlement agreement. Therefore, HomeServices of America and its related companies continue to litigate the *Sitzer/Burnett* case. In addition, the statement indicated that employees of the remaining corporate defendants named in the cases are not covered by this settlement. Once a final order is issued, HomeServices will appeal the liability finding and post the necessary bond to appeal the jury's verdict. This appeal may take one to three years. In the interim, HomeServices will ask the court to reduce the damages and to delay payment. The 8th Circuit Court of Appeals is expected to hear the appeal of the *Sitzer/Burnett* decision in spring 2024.

**6. What does this mean for Wisconsin real estate practice?**

The WRA is evaluating the potential implications on state-approved (WB) forms and broader agency practices. Furthermore, an existing work group within the WRA will be examining Wisconsin's buyer agency practices.

**7. Will NAR increase its dues to pay for this and other lawsuits?**

NAR indicated in its March 15, 2024, statement relating to the settlement that it will not be changing 2024 membership dues because of the \$418 million settlement payment.

**8. Will a copycat class action lawsuit be filed in Wisconsin?**

It's possible. However, Wisconsin's requirement for real estate licensees to use state-approved (WB) forms that include commission-transparent and consumer-friendly language makes Wisconsin unique compared to other states. Therefore, Wisconsin's consumer-friendly forms and laws may make it less attractive for plaintiffs' attorneys to file similar lawsuits in Wisconsin.

## **Wisconsin transactions and commissions**

**1. What is the relationship between the local REALTOR® associations, the WRA and NAR?**

The term "three-way agreement" refers to the unique structure of the REALTOR® organization. The REALTOR® organization is a "federation," comprised of national, state and local associations of REALTORS®. To become a REALTOR®, a real estate licensee must join all three associations: local, state and national.

**2. Can listing firms continue to offer compensation to buyers' firms in the MLS? Is NAR's cooperative compensation or "participation rule" still in effect?**

Yes. The *Sitzer/Burnett* trial judge has not yet issued an order or any injunctions that would require a change to business practices and policies.

However, as part of the NAR *Sitzer/Burnett* settlement, NAR has agreed to put in place a new rule prohibiting offers of compensation on the MLS. Offers of compensation could continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals. And sellers can offer buyer concessions on an MLS; for example, concessions for buyer closing costs. Effective mid-July 2024.

### **3. Is the potential impact of the *Sitzer/Burnett* case different in Wisconsin vs. other states?**

Yes. Wisconsin licensees are required to use state-approved (WB) forms. This does not appear to be the case in many other states. Also, Wisconsin's law authorizes and encourages buyer agency. In other states, buyers may not have the same choices as in Wisconsin. In Wisconsin, buyers can choose to hire a firm to either: 1) represent the buyer as a client by entering into a buyer agency agreement, or 2) work with the buyer as a customer where the firm is a subagent of the listing firm. Consumers may choose their preferred model.

### **4. How do Wisconsin's state-approved real estate forms help protect licensees from antitrust claims?**

Under Wisconsin law, the Real Estate Examining Board (REEB) at the Department of Safety and Professional Services (DSPS) approves forms for use in real estate practice (WB forms). The DSPS is a consumer protection agency. WB forms are required to be used by all real estate licensees in Wisconsin. The current WB forms address the negotiation of commission rates and how commission is paid to firms. The existing language indicates that commission rates are not predetermined by the firms and can be negotiated. Consumers have choices.

- **Buyer agency agreements:** Some states do not have a written buyer agency agreement, such as Wisconsin's WB-36 and WB-38 buyer agency agreements. For those states that do have a written buyer agency agreement form, the form may not include contract provisions and features like Wisconsin's, such as blank commission lines, other compensation sections, and authorization to seek payment of commission from the seller or listing firm.
- **Listing contracts:** The Wisconsin WB listing contracts also have blank lines to write in the commission rate or amount. The listing contracts have a section labeled Compensation to Others to write the amounts offered to cooperating firms.

### **5. Are steps being taken in Wisconsin to heighten commission transparency for consumers?**

Yes. Effective January 1, 2024, the REEB updated the state-mandated listing contracts, buyer agency and tenant representation agreements to further improve consumer transparency regarding commissions. The revised language emphasizes that the client and the firm decide the commission rate or amount together and explains that commission offered to cooperating firms is extended to firms "working with buyers or tenants such as subagents and buyer's firms." The updated forms indicate that a variety of commission models and business models exist.

Additionally, the updated forms include a revised section encouraging alternate dispute resolution instead of judicial resolution in court, and a note highlighting the limitation on liability for licensees.

### **6. What should listing agents advise their seller clients when discussing the listing contract and compensation?**

Listing agents should talk about the amount of compensation to be paid by the seller to the listing firm. It should be clear that the amount of compensation is negotiable. A firm may require that its agents request a minimum amount of commission for providing services to the seller. If the seller will not pay the minimum amount, the seller may need to work with a different firm.

The listing firm also should talk about the various options for paying the buyer's firm. It should be clear that the amount of compensation to be offered to the buyer's firm is negotiable. The seller should understand there are options to pay \$0 to the buyer's firm, offer a dollar amount or

percentage, or, if the buyer's firm has buyer agency with the buyer, allow requests from the buyer for the seller to pay the buyer's firm as part of the buyer's offer.

**7. What should buyer's agents advise their buyer clients when discussing the buyer agency agreement and compensation?**

Buyer's agents should discuss the amount of compensation to be paid by the buyer to the buyer's firm. The buyer should be aware that the amount of compensation is negotiable. It should be clear that the buyer is responsible for paying the buyer agency fee and the amount owed by the buyer may be reduced or eliminated by what the listing firm is offering to pay the buyer's firm.

**8. May buyer's agents discuss with clients which listed properties do or do not contain an offer of compensation to buyer's firms?**

Yes. The buyer's agent should discuss the available properties their clients may be interested in and may disclose the compensation (if any) that is being offered to the buyer's firm. It is strongly recommended that buyer's agents use a buyer agency agreement that explains the different ways compensation can be paid to the buyer's firm.

**9. If there is a difference between the compensation negotiated in the buyer agency agreement and the compensation being offered in the MLS, can the buyer's firm negotiate with the listing firm?**

Yes. However, the buyer's firm cannot submit an offer to purchase that is contingent upon the listing firm increasing the compensation to the buyer's firm. The buyer's firm may use a buyer agency agreement, such as the WB-36, that indicates the buyer will make up the difference if an MLS offer of compensation falls short and the seller declines to pay an additional amount to the buyer's firm to cover the difference.

**10. Is a listing firm allowed to offer zero compensation to buyer's firms in the MLS?**

Yes. This is allowed, as is any other dollar amount or percentage. Listing agents should talk to seller clients about the listing firm's compensation, how it's negotiable, and the seller's various options for offering compensation to buyers' firms. If a particular MLS does not allow entry of \$0 or 0%, the listing firm could offer the minimum allowed in that MLS.