

Recent antitrust lawsuit filed against NAR

Hello all,

We want you to know that yesterday, a class action lawsuit was filed in the Northern District of Illinois against the National Association of REALTORS® and four large brokerage companies alleging that the defendants conspired to restrain price competition among buyer brokers via promulgation of NAR's MLS rules. The complaint is baseless and has no merit. We are currently conferring with outside counsel on strategy and we will keep you abreast of developments.

When asked by the media for a comment, NAR is sharing the following official statement:

The complaint is baseless and contains an abundance of false claims. The U.S. Courts have routinely found that Multiple Listing Services are pro-competitive and benefit consumers by creating great efficiencies in the home-buying and selling process. NAR looks forward to obtaining a similar precedent regarding this filing.

Mantill Williams, VP of Communications, National Association of REALTORS®

If you receive any inquiry about this filing, please feel free to direct them to Mantill Williams (mwilliams@realtors.org) or provide the official NAR response above. If you come across chatter and discussion about the filing, be very cautious on social media and your interactions with other local media outlets. It is important that your actions do not contribute to making this story grow.



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CAR General Counsel Scott Peterson offers Moehrl v. NAR (Anti-Trust Suit) Summary

Over the next several weeks and months, all of you will undoubtedly be hearing about a class-action lawsuit filed in U.S. District Court in Illinois on March 6, 2019 naming NAR and other national brokerage entities as defendants. The basis of the complaint in Moehrl vs. N.A.R., et al. ("Moehrl") is that the required "offer to compensate" embedded throughout the rules of our multiple listing services ("MLSs") is anti-competitive and a violation of the Sherman Anti-Trust Act. While this is obviously in a very preliminary stage, I wanted to briefly summarize the complaint and provide some of my thoughts specific to Colorado. THIS IS NOT LEGAL ADVICE, but rather a brief summary of the complaint's allegations as well as some additional thoughts surrounding the issues alleged.

Filed as a "class action" with only one representative plaintiff, Christopher Moehrl, the allegation is that there are literally many thousands of similar potential plaintiffs. Basically, a potential class member could include almost any "seller" who listed and sold their home during the previous 4 years on one of 20 individual MLSs ("Covered MLSs") located throughout the United States. According to the complaint, two of the Covered MLSs named are located in Colorado – REColorado and PPAR MLS. Please be clear, none of the named MLSs are named as defendants in the case, they are only described to help define the alleged "class" of potential plaintiffs.

Moehrl's primary allegation on behalf of the class is that the "offer to compensate" a buyer's broker (as required by NAR/MLS rules) is a "blanket, non-negotiable offer" that creates an anti-competitive environment which harms sellers. In simple terms, because a seller, through the Exclusive Right to Sell listing agreement, often pays a commission to both their own "listing" broker, as well as the "buyer's" broker, AND the amount of cooperative commission must be defined in the MLS, the cooperative commission amount is effectively "non-negotiable."

Moehrl argues that MLS rules requiring explicitly listed offers of compensation effectively eliminates the possibility that a buyer would ever pay their own broker directly. The complaint assumes that, if buyers were to commonly pay their own broker directly, buyer brokers would actively compete with each other for a buyer's business (presumably by lowering their negotiated brokerage fees directly with the buyer). The complaint alleges that, as a result of the MLSs established "offer to compensate" rules, sellers are forced to pay artificially inflated commissions to a buyer's agent in almost every transaction.

In addition to naming NAR in the class action, Moehrl names the four largest brokerage holding entities in the United States (Realty Holdings Corp., HomeServices of America, ReMax Holdings, Inc., and Keller Williams Realty, Inc.) as co-defendants. Essentially, Moehrl alleges that these holding entities (through their dozens of combined real estate brands and thousands of individual franchisees) have participated in the alleged NAR/MLS cooperative compensation "conspiracy" to harm sellers.

As evidence of an alleged anti-competitive "conspiracy," Moehrl cites NAR/MLS policy requiring explicitly defined "unilateral offers of compensation" expressed as a percentage of the gross selling price

or as a definite dollar amount when a listing broker lists a property on an MLS and offers compensation to other MLS participants (cooperating brokers).

In addition, Moehrl cites Code of Ethics Article 16 (SOP 16-16) to allege that “buyer’s brokers” are precluded from using their buyer’s offer to attempt to modify the listing broker’s offer of compensation. Using this as evidence, Moehrl refers to the existence of a “**blanket, non-negotiable** offer of buyer broker compensation.”

I would offer three important areas for consideration as discussion of the allegations in this class action will invariably develop as this matter progresses through the legal process:

NAR/MLS Policies

First, within NAR/MLS policy, there is no mandatory set minimum fee that needs to be offered to a cooperating broker through the MLS offer to compensate. ANY FEE, HOWEVER NOMINAL, THAT A SELLER WANTS TO OFFER TO A COOPERATING BUYER’S BROKER IS COMPLIANT WITH MLS POLICY. An offer to compensate a buyer’s broker from \$0.01 to \$1,000,000,000 would be compliant with NAR/MLS policy. The cooperating fee (if any) is specifically negotiated between the seller and the listing agent prior to any inclusion on the MLS and unilateral offer to buyer brokers.

Moreover, NAR/MLS policy regarding explicitly defined cooperating commission offers in the MLS is primarily established to foster cooperation and some level of certainty for BOTH a buyer’s agent AND the buyer regarding the payment of any commissions that may be offered by the listing broker. In our Colorado Exclusive Right to Buy, a buyer often DOES have a contractual obligation to pay their own broker a pre-negotiated “Success Fee” upon closing. The “offer to compensate” in the MLS serves to clarify the implications of this for the buyer and buyer’s agent.

Code of Ethics

Moehrl uses Article 16 (SOP 16-16) to allege that buyer brokers are affirmatively prohibited by the NAR Code of Ethics from utilizing the buyer’s offer to modify the MLS offer of compensation to the broker. While the Code does not specifically speak to a distinction between using the offer to “decrease” the compensation vs. “increase” the compensation, presumably only the latter would be an ethical violation. If using the offer to “decrease” the compensation to a buyer’s broker was an Ethics violation, we would see complaints all the time, as it is a VERY common practice.

Buyer’s brokers frequently reduce their commissions in favor of the buyer for the purposes of seller concessions to the buyer, purchase price reductions, inspection resolutions, etc. This is almost universally done via the contract and is fully consistent with Colorado license law. In addition, the Colorado Association of REALTORS® administers Ethics matters for the vast majority of the state and we have never seen an Ethics complaint against a broker for seeking to reduce the offer of compensation in the thousands of transactions in which the practice occurs. Clearly, a buyer’s broker seeking to “increase” the offer of compensation through the buyer’s offer would potentially be violating the Code of Ethics and, likely, several aspects of Colorado license law.

On the contrary, Article 3 (SOP 3-3) specifically describes the opposite of Moehrl’s contention. Standard of Practice 3-3 states: “[The Code] **does not preclude the listing broker and the cooperating broker from entering into an agreement to change the cooperative commission.**”

Colorado Forms/Practice

By any account, Colorado has been one of the hottest and most innovative real estate markets in the country for the better part of the past decade. We are blessed with a diversity of real estate brokerage business models that complement each other and offer Colorado buyers and sellers with a spectrum of choices when it comes to service levels and commission structures.

As every licensed broker in Colorado knows, there is no such thing as a “blanket, non-negotiable” commission (per MLS rules or otherwise). All fees and payment obligations are fully negotiable between the buyer and their buyer broker, the seller and their listing broker and, to the extent it is consistent with the respective brokerage agreements, between the buyer and seller.

There will be a tremendous amount of discussion and information shared about this suit and these issues in the weeks and months ahead. Our goal at CAR is to continue to share timely, accurate and factual updates with our members in support of their businesses and the conversations around these important topics.

Antitrust Suit names NAR

Key Messages:

- First, within NAR/MLS policy, there is no mandatory set minimum fee that needs to be offered to a cooperating broker through the MLS offer to compensate. ANY FEE, HOWEVER NOMINAL, THAT A SELLER WANTS TO OFFER TO A COOPERATING BUYER'S BROKER IS COMPLIANT WITH MLS POLICY.
- A cooperating fee (if any) is specifically negotiated between the seller and the listing agent prior to any inclusion on the MLS and unilateral offer to buyer brokers.
- Buyer's brokers frequently reduce their commissions in favor of the buyer for the purposes of seller concessions to the buyer, purchase price reductions, inspection resolutions, etc. This is almost universally done via the contract and is fully consistent with Colorado license law.
- The Colorado Association of REALTORS® administers Ethics matters for the vast majority of the state and we have never seen an Ethics complaint against a broker for seeking to reduce the offer of compensation in the thousands of transactions in which it occurs. Clearly, a buyer's broker seeking to "increase" the offer of compensation through the buyer's offer would clearly be violating the Code of Ethics and, likely, several aspects of Colorado license law.
- "[The Code] ***does not preclude the listing broker and the cooperating broker from entering into an agreement to change the cooperative commission.***"
- By any account, Colorado has been one of the hottest and most innovative real estate markets in the country for the better part of the past decade. We are blessed with a diversity of real estate brokerage business models that complement each other and offer Colorado buyers and sellers with a spectrum of choices when it comes to service levels and commission structures.
- As every licensed broker in Colorado knows, there is no such thing as a "blanket, non-negotiable" commission (per MLS rules or otherwise). All fees and payment obligations are fully negotiable between the buyer, their buyer broker, the seller and their seller broker and, to the extent it is consistent with their respective brokerage agreements, between the buyer and seller.