

Staying in commission: guidance for real estate companies on antitrust litigation

By Benjamin H. Diessel, Esq., and Emmett Gilles, Esq., Wiggin and Dana*

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What began in 2019 as two antitrust lawsuits against the National Association of Realtors (NAR) and four national brokerages has turned into a flood of class action litigation against residential brokers and realtor associations.

Following a Kansas City jury's \$1.78 billion award in October 2023 to a class of Missouri home sellers in *Sitzer v. NAR*, class action lawyers have raced to courthouses around the country to file copycat suits. NAR recently entered a nationwide settlement for \$418 million, while three of the brokerage defendants previously settled for substantial amounts, leaving only Berkshire Hathaway's HomeServices of America as a non-settling defendant in *Sitzer*.

Residential real estate brokerage firms may be wondering how these companies ended up facing litigation, what they can do to understand if their company faces similar risks, and how best to prepare for that scenario. Antitrust cases against real estate brokerage firms and associations are a serious and increasingly prevalent threat to the industry.

In this article, we explain what the cases are about, how they've evolved, and some practical steps companies can take to prepare for the possibility of litigation and legal exposure.

Why are companies and associations being sued?

Plaintiffs in these cases allege, in essence, that realtor association rules long adhered to by member brokerages require each seller listing a property on a multiple listing service (MLS) to unilaterally offer a percentage commission to the buyer's broker.

According to plaintiffs, these rules allow buyer brokers to advertise to their clients that their services come at no charge while steering the client toward listings with higher commission rates around 6%. Plaintiffs contend that this diminishes competition by effectively fixing broker compensation, inflating housing prices for buyers and commission fees for sellers.

How has the litigation evolved?

Although litigation initially focused on NAR and the major national brokerages, over a dozen copycat class actions have followed the watershed *Sitzer* verdict. This wave of lawsuits has cast a wider net, including a broader geographic scope, local associations independent from NAR and with different rules, and smaller local and regional brokerage firms.

Certain plaintiffs have proposed consolidating many of these cases for pretrial purposes in front of the judge who presided over the *Sitzer* trial.

Problematically, some cases proposed for consolidation include independent real estate associations with their own rules and small, highly localized brokerage firms. For these small companies, getting sucked into the vortex of a complex multidistrict litigation focused on NAR rules — in which NAR itself is no longer defending against these claims — could potentially impose crippling cost, delay, and uncertainty.

What is the risk of legal liability?

The legal risk from broker-commission antitrust litigation is real, and should not be underestimated. Plaintiffs have claimed as damages the total of all buyer broker commissions for listings on specific MLSs within the four-year limitations period for antitrust claims.

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In *Sitzer*, the first and only case to go to trial thus far, the jury accepted that damages theory, with potentially devastating financial consequences for HomeServices of America if it does not settle and the result survives appeal.

HomeServices is also a defendant in *Moehrl v. NAR*, a large class action involving metropolitan listing services in five regions that is anticipated to go to trial in Chicago later this year. Both the appeal in the *Sitzer* case and the *Moehrl* trial should be watched closely for guidance to defendants and potential defendants in this litigation.

Is settlement an option?

Settlement is an option — and one that many defendants are embracing. Just before trial in *Sitzer*, Anywhere settled the claims against it in both *Sitzer* and *Moehrl* for \$83.5 million, while RE/MAX

settled both cases for \$55 million. In February, Keller Williams reached a global \$70 million settlement with plaintiffs.

Most recently, NAR entered a \$418 million nationwide settlement with home seller plaintiffs on behalf of itself, its member realtors and associations, and NAR-affiliated brokerages with less than \$2 billion in 2022 transactions. Larger NAR-affiliated brokerages and MLSs are not covered by the settlement, but may opt in by making their own settlement payments based on total transaction volume for brokerages and number of subscribers for listing services.

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This trend toward settlement underscores that many companies see benefit in putting these issues behind them rather than contending with the uncertainty and expense of litigation.

Is federal and state enforcement an additional concern?

Federal and state antitrust enforcers have the capability to act in this area, but whether they will exercise that authority remains uncertain. Regulators are certainly tracking these issues closely.

For example, the U.S. Department of Justice (DOJ) extracted a settlement from NAR in November 2020, reportedly requiring NAR to increase the transparency of buyer broker compensation rules and ensure that brokers have equal access to all listings regardless of their commission structure. The DOJ later sought to modify that settlement so that it could investigate other NAR rules, but NAR argued that the DOJ was bound by its settlement and could not initiate further investigations.

A federal judge agreed with NAR, and the DOJ has appealed. State Attorneys General have also taken an increasingly active role in antitrust enforcement, including high-profile cases against Google and Amazon. They, too, may take an interest in this area. Accordingly, companies would be wise to prepare for the possibility of investigations and litigation brought by antitrust enforcers.

When should a real estate company consult counsel?

Despite the challenges facing brokerage firms large and small, antitrust cases against such firms are no slam dunk. Commissions

for both buyer and seller brokers remain negotiable under challenged rules.

Sellers are free to decide what commission they wish to offer, and buyers can insist on viewing listings regardless of the commission. Moreover, buyers and sellers generally benefit from incorporating the cost of real estate services into the financing that accompanies a home purchase.

Additionally, local association rules may be more permissive than NAR rules. For example, the Real Estate Board of New York (REBNY) rule under challenge in two cases filed in Manhattan federal court explicitly permitted the seller to specify a desired level of buyer-broker commission in the listing or in a written agreement with the seller-broker.

Real estate brokers who wish to understand whether they may be ensnared in antitrust litigation may accordingly be well served by reviewing local association rules and practices in the market and considering whether the brokerage firms subscribing to their regional MLS have earned a significant amount in commissions in recent years.

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Companies and associations, regardless of their size or region, should prepare for the possibility of broker-commission litigation and/or investigation. A good first step is to proactively consult with legal counsel, as it is easier to identify and retain counsel before being sued rather than in the rush of firms looking for representation after a new case drops.

Appropriate counsel will be equipped to assess each company's circumstances and market to provide directional guidance concerning the likelihood of potential litigation or investigation. Counsel should also be prepared to evaluate potential exposure in the event of liability, and to assess how to best protect the firm in view of that potential exposure.

In the event of an investigation, qualified counsel also will be equipped to engage directly with antitrust enforcers, advocate on behalf of the company, and prepare an appropriate response. These are all areas where proactive efforts may save a company time and expense and avoid the significant disadvantage of being caught flatfooted.

About the authors



Benjamin H. Diessel (L) is a partner in **Wiggin and Dana's** litigation department and chair of the antitrust and technology disputes practice group in New Haven, Connecticut. He helps clients navigate a broad range of issues, including antitrust litigation and advising, intellectual property litigation and licensing, commercial litigation, securities litigation, regulatory matters, and internal investigations. He can be reached at bdiessel@wiggin.com. **Emmett Gilles** (R) is an associate in the firm's litigation department in New Haven. Prior to joining Wiggin and Dana, he served as a law clerk to Circuit Judge William J. Nardini of the U.S. Court of Appeals for the Second Circuit and District Judge Jeffrey A. Meyer of the U.S. District Court for the

District of Connecticut. He can be reached at egilles@wiggin.com. This article was originally published April 4, 2024, on the firm's website. Republished with permission.

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