

Landmark Real Estate Settlement Spurs Uncertainty Among Home Buyers, Sellers and Listing Agents

Marc Horowitz | March 28, 2024



A much-publicized March 15 settlement of an antitrust lawsuit brought against the National Association of Realtors, a powerful industry trade group, has left East End brokers, home buyers and sellers with more questions than answers as they struggle to figure out what it all means.

Multiple media reports, often quoting well-placed industry experts, have suggested that the settlement could result in lower commission costs for home sellers — and lower fees for real estate agents.

It's understandable why home sellers would believe they were poised to save significant money after being bombarded with headlines like these: "The 6% Commission On Buying or Selling a Home is Gone After Realtors Association Agrees to Seismic Settlement" (CNN); "Powerful Realtor Group Agrees to Slash Commissions to Settle Lawsuits" (*The New York Times*); "A Major Settlement Could Spell an End to 6% Real Estate Commissions" (NPR).

Some reports also raised the possibility that home buyers may soon be forced to pay a commission out of their own pockets — which would represent a sea change in the way the real estate industry does business. Historically, the home seller, not the buyer, has been responsible for paying the commission costs of the transaction.

Hyperbolic media headlines aside, the industry's time-tested way of doing business is about to change, and some real estate insiders believe the changes will be radical.

"They took a 100-year-old model and turned it upside down and inside out," says Judi Desiderio, CEO and president of Town & Country Real Estate, an independent firm with multiple offices and approximately 160 agents spread across the North and South Fork. "They created total chaos. We're fielding questions every day from buyers and sellers asking us how this affects them."

The model Desiderio alludes to is probably familiar to almost everyone who has purchased a piece of real estate at some point in their lives. For many decades, home sellers traditionally paid a commission — usually 5% or 6% of the total purchase price of the property — to their listing agent. The selling agent then shared that commission with the buyer's agent.

But the home sellers who filed multiple lawsuits against the NAR and several large brokerage firms argued that NAR rules governing sale properties listed on the group's affiliated Multiple Listing Services (MLS) platform created an industry-standard commission rate that was unfairly and artificially inflated.

The NAR and other industry spokespeople countered by noting that the commission rate has always been negotiable, which is true in theory. But in practice, the 5–6% rate was the de facto standard and essentially all but carved in stone.

In a statement released a few days after news of the settlement broke, the NAR clarified what it said were "inaccuracies" in media reports on the group's role in setting commission rates.

"The National Association of Realtors does not set commissions—they are negotiable," the statement said. "The rule that has been the subject of litigation requires only that listing brokers communicate an offer of compensation. That offer can be any amount, including zero."

Nevertheless, as part of an agreement announced in mid-March, the NAR said that it would eliminate policies that helped agents set sales commissions. The group also agreed to pay \$418 million as compensation to United States home sellers.

Additionally, the NAR said it would end a policy that required a broker advertising a home for sale on its MLS platform had to offer an upfront compensation to a buyer's agent. That change is significant because it makes it possible for sellers to negotiate commissions directly with a buyer's agent — as long as the seller's agent discloses the terms of any compensation arrangement.

The NAR also said that it will now require buyers' agents to secure a written agreement with their clients. The purpose is to ensure that buyers know what fees they'll be liable for before the transaction closes.

Regardless of how comprehensively commission costs might be disclosed upfront, many home buyers will be surprised to learn that they may soon be expected to pay a broker's fee on top of the myriad closing costs that already jack up their final purchase price by thousands of dollars.

The traditional buyer-broker relationship may look very different in the near future than it does today, predicts Alan Schnurman, an attorney, real estate broker, real estate investor and author (with Eric Feil) of *I Can, I Will, I Must: Buying the Hamptons, Building a Successful Future, Becoming the Best You Can Be*.



“Buyers in upscale markets such as the Hamptons, Aspen, Palm Beach or Manhattan tend to be sophisticated and accomplished purchasers and will follow a path to the listing broker,” Schnurman opines. “In other markets, you can just imagine the surprise when a buyer is told that they will have to pay a broker's fee. I am confident the reaction will not be one of joy.”

If the buyer's broker will no longer be compensated by the selling broker, Schnurman echoes many of his industry peers in predicting that various new compensation arrangements will need to arise between broker and buyer. These arrangements might take the form of a flat fee, an hourly fee or a percentage of the selling price.

Will a significant number of buyers be willing to forgo the market expertise, property resources and negotiation savvy that good agents bring to the table in order to avoid paying a commission? That's an open question at this point. But it's a question that the brokerage industry may ultimately be forced to reckon with.

“More and more, buyers will use the Internet to locate the residences that fit their location and price,” Schnurman says. “The buyer will then contact each listing broker to view that residence. This will bypass any potential fees they may have to incur for a buyer’s broker.”

On the selling side of the transaction, since there will no longer be a baked-in standard commission rate of 5–6% charged to the seller, many economists and real estate professionals believe that selling agents will be forced to lower their fees, conceivably by as much as 50%, to compete for business.

“If I was a seller, I would certainly raise that issue with my listing broker,” Schnurman says. “Let’s assume you do not have to split my fee with the buyer’s broker. Well, in that case, why am I paying 6% and not 3%?”

Since East End homes routinely change hands at astronomical price points, it’s easy to see why some sellers are juiced by the prospect of paying a significantly reduced commission rate (It’s also worth noting that realtor commission rates in the United States are considered high by international standards. Rates generally vary between 1% and 3% in the majority of developed nations.)

Between now and July, when the agreement is subject to approval by a federal court — and likely for many more months to come — the real estate world will be operating in something of a no man’s land.

“It will take 12 to 36 months until the dust settles on how this shakes out,” Schnurman predicts.

Desiderio believes that in the months ahead the real estate industry has a right to expect more clarity from external stakeholders, whether they be the courts, the NAR or New York State.

“You lay down a law on an industry that’s been functioning for 100 years, and you say, ‘In four months we want you to do it differently,’” Desiderio laments. “OK, give us guidance, give us disclosures, tell us exactly what you want us to say and do. I think we’re all jumping off the cliff without checking the bungee cord right now.”