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Landmark Verdict Against Realtors Among Several Problems Plaguing Industry, Say Experts

As the National Association of Realtors faces litigation on several fronts, some say that inflation and property shortfalls are the real issues.

A home for sale is seen in Orlando, Fla., on Dec 8, 2020. (AP Photo/John Raoux, File)

By Michael Washburn
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The U.S. real estate market is in an uproar following an Oct. 31 verdict in a Missouri federal court finding that the National Association of Realtors (NAR) and several brokerages conspired to artificially inflate commissions paid to real estate agents. They were ordered to pay $1.79 billion in damages.

Two days after the verdict in *Sitzer/Burnett v. NAR Commission*, the NAR announced that its CEO, Bob Goldberg, had resigned. Mr. Goldberg claimed to have made the decision in October, before the verdict was in.

The Missouri verdict, which the NAR plans to appeal, paints the NAR as an unscrupulous organization that took advantage of sellers' lack of sophistication to inflate real estate agents' fees.

Also named in the lawsuit, which specifically addressed practices in the Missouri cities of St. Louis, Kansas City, Springfield, and Columbia, are Keller Williams Realty and HomeServices of America.

Lawyers in other states have scented blood in the water. On the heels of the Oct. 31 verdict, class-action lawsuits in Illinois, Missouri, New York, South Carolina, and Texas seek to recoup huge sums of money from the NAR and to curb what some see as mercenary and unfair practices in real estate deals.

In the midst of all the litigation, agents are getting a bad rap, and people fail to appreciate just how much work they do, believes Cara Ameer, a realtor at Coldwell Banker in Orange County, California.

"Agents are essentially on call for our clients 24/7. There is no other profession that is expected to be available all the time and anytime," Ms. Ameer told The Epoch Times.

Permanent Change?

Some have even gone so far as to predict that a radical shift in prevailing practices is underway now that the market has finally woken up to the runaway profiteering and abuse, and that real estate agents in the near future will no longer be able to charge large commissions.

While the verdict at the end of October found the NAR and co-defendants to have bilked customers of $1.79 billion, the total damages that NAR and co-defendants face may reportedly run as high as $5 billion as the litigation plays out.

The market may be brutal for buyers and sellers, and many have found agents' fees exorbitant, yet a marked lack of consensus exists on the NAR's degree of responsibility.

In the real estate sector, opinion on the merits of the lawsuits is hardly unanimous, and some experts view the litigation, and the issues it raises, as a distraction from the forces that have made the market so treacherous. These factors include the lingering effects of the COVID-19 lockdowns, and inflation driven largely by the expansionist monetary policies of the Federal Reserve.

In other words, those suing the NAR are looking for massive payouts from an organization that has become a scapegoat for what ails real estate, the experts say.

Claims of Price Gouging

At issue in the lawsuits is the use of the Multiple Listing Service (MLS), which requires agents listing properties for sale to split their fees with other agents, i.e., those of buyers of the properties in question.

The prospect of a tiny commission, obviously, does not appeal to sellers' agents at all. Because of the requirement to split their fees with another agent, and then to give half of their take to their brokerage, for many the only way to turn a profit is to pass on to the seller a very high commission at closing, with fees of 5.37–6.0 percent a national norm.

The algorithms have required sellers to sacrifice, for example, up to $6,000 on the sale of a $100,000 property.

The 6 percent commission began to be standard practice in the 1940s and survived a U.S. Supreme Court ruling that it was illegal as well as lawsuits targeting real estate boards. People had grown accustomed to it, and it enjoyed the status of an industry standard regardless of its technical legal status.

The lawsuit just decided in Missouri challenges the longstanding assumption that these are closing costs, and realtors know how the market works, so sellers had just better accept the haircut and be glad they found a buyer at all.

The Missouri case, and the class-action lawsuits it has galvanized and emboldened, signal a shift in popular sentiment against standard practice in the real estate industry. Yet not everyone agrees with the legal and ethical rationales put forward in the gathering litigation.

Excessive Fees?

While it may be tempting to blame the challenging market on greed and insularity in the realtors’ profession, some warn against making the latter into a scapegoat for a complex market where fiscal policies at the federal level play no small role in driving prices up.

A dissenting view of the NAR controversy comes from Ms. Ameer at Coldwell Banker.

She does not believe the MLS is a tool for fraud or works only to the advantage of agents. In fact, it saves buyers and sellers a lot of time and trouble.

"The MLS is a cooperative system that allows agents from all participating brokerages to efficiently match sellers who wish to go into the MLS with buyers who are looking for the kind of property they have. We are able to sift through a plethora of data fields to narrow all down to the properties that are most on point for what the buyer wants," Ms. Ameer told The Epoch Times.

The alternative to the use of the MLS in real estate deals would be for both the buyer and seller to work directly with the listing agent, and this is a very poor idea. Listing agents will put the interest of the party that hired them—the seller—first.

"Buyers may unknowingly think they will receive the same service going through a listing agent, but that is not the case. A listing agent represents their seller's best interests and is not looking out for a buyer's best interests, and a listing agent trying to facilitate a transaction between both parties is highly litigious from a risk management perspective and puts that agent in a precarious professional position," said Ms. Ameer.

Without a system that makes use of a buyer's agent and a seller's agent and splits the total fee evenly between them, a listing agent would end up taking a smaller fee for representing both parties to the deal, would find that compensation insufficient for having to oversee all aspects of the sale, and would have little motivation to do what is best for either the buyer or the seller, Ms. Ameer pointed out.

Fair Practices

Despite what many media sources covering the lawsuits would lead one to believe, realtors who ask for a 6 percent commission are not mercenary and their request in no way precludes negotiation about fees, Ameer believes. The fact that a certain standard has prevailed in the industry for some time does not mean that it is, or ever has been, an unbending rule.

"What the public may not know is that all commissions have always been negotiable between a seller and their agent. There is no standard commission and never has been. Sellers have always had a choice in how they wanted to sell their home and for the price and terms, including the commission. The agreed-upon fee is a business decision between their agent and themselves," Ms. Ameer stated.

But an even more serious misperception here, she continued, has to do with the widespread tendency to view a 6 percent commission as unreasonably high, or to assume that greed on the part of agents accounts for this longstanding practice.

People who make such allegations are unaware of, or dishonest about, the internal dynamics of sales and the financial realities of operating as a broker, she believes.

No Cakewalk

Agents are independent contractors, who generally do not receive a base salary from their brokerages or compensation for the gas and other travel expenses they incur on the way to and from showings—a critical and time-consuming part of an agent's job—or for the marketing, advertising, association dues, and other fees and expenses that come up daily in the course of their work, Ameer said.

If a seller's agent takes half of the 6 percent commission, that does not mean that that 3 percent of the value of the property sold goes into the agent's pocket. On the contrary, the brokerage takes a significant chunk, even half, of the three percent to pay the bills and the salaries of support staff. Depending on the brokerage, there may also be a marketing and/or franchise fee, which also comes directly out of the agent's check, said Ameer.

"Whatever the agent receives, the agent must then set aside approximately 30–40 percent for state and federal taxes as well as social security and retirement savings. This is not withheld automatically, as with a salaried W-2 individual. Whatever amount is left is what they have to support themselves and their family and also try to put some of that into savings if they can, and use to reinvest in their own business," Ms. Ameer continued.

"Many agents have to pay for their health insurance as well, which is a significant expense, so the net amount the agent makes after all is accounted for is not as much as people may think," she added.

Ms. Ameer contrasted the role of attorneys with that of lawyers who bill by the hour. With a fixed fee, agreed upon in advance between the seller or buyer and the agent, the latter will perform a potentially unlimited amount of work on a given transaction, with no adjustment in compensation.

Agents perform a myriad of tasks, preparing properties for showings, conducting showings, writing, editing, and publishing listings online, handling inquiries that come in, being there for inspections, meeting vendors, attending closings, and working tirelessly among all the parties involved in a deal to bring it to the finish line, she said. Yet the fee will be the same whether the agent manages to sell the property after a single showing, or after a hundred showings.

If agents billed by the hour as lawyers do, people would be in awe of the total fees, and would realize how modest a 6 percent commission looks in comparison, she said.

Ameer considers the lawsuits against the NAR without merit and blind to the day-to-day realities of the industry.

A Scapegoat?

The NAR lawsuit, and the more general tendency to fault real estate professionals for people's frustrations, may be a distraction from the issues that brought the market to its current pass.

Brokers who work in the space from day to day see macroeconomic forces playing a decisive role, and one in particular that has been particularly problematic under the administration of President Joe Biden.

For all the fanfare with which President Joe Biden announced his Inflation Reduction Act back in 2022, things have become significantly worse, according to data from the Committee on Energy and Commerce.

Since Mr. Biden assumed the presidency in January 2021, inflation has risen 15 percent overall, and the increase is particularly evident the costs of day-to-day items such as gasoline.

President Joe Biden speaks about investments in conservation and protecting natural resources at Red Butte Airfield, Ariz., on Aug. 8, 2023. (Madalina Vasiliu/The Epoch Times)

The economy as a whole is mediocre, and real estate is no different in this regard. Buyers chafe at the high prices of real estate in an inventory-starved market and the historically high interest rates on their mortgages.

Trends underway in 2021 and 2022 have only become worse. The average rate on a 30-year mortgage, for example, hit 5.46 percent in May 2022, its highest figure since August 2009. Many people thought that was a shockingly high rate and hoped the market would bounce back. Since then, it has continued to rise so dramatically that some today may look back with a tinge of nostalgia at a time when the rate was that low.

The real estate market at present is especially tough for buyers at the lower end of the socioeconomic curve, with 30-year fixed mortgage rates at 8.037 percent as of this writing, and a marked lack of inventory has driven up prices.

“As for market factors, it’s just inflation. That’s driving up the federal interest rates and driving up the home loan rates,” said Zachary Schorr, a Los Angeles-based real estate attorney.

The annual inflation rate stands at 3.2 percent for the year ending Oct. 31. At the end of June 2022, the annual rate stood at 9.1 percent, and its declines have been slow, incremental, and fickle, followed often by sharp increases, as for example from 3.0 percent at the end of June 2023 to 3.7 percent as recently as the end of September 2023.

In the view of some economists, the inflation rate is largely a function of the Federal Reserve’s expansionist monetary policy. The Fed's aggressive buying of Treasury bonds from banks has infused massive liquid cash for banks to lend out, in what economist Ivan Pongracic at Hillsdale College described as the government's monetization of its own debt.

In addition, the Biden administration has relentlessly poured money into the public sector with massive stimulus packages, including the $2.2 trillion CARES Act of March 2020, the $1.9 trillion American Rescue Plan Act of 2021, and the $1.7 trillion federal government spending package that President Biden signed off on in December 2022.

Policies driving high inflation are curiously misaligned with a market in which inventory shortfalls push property prices high, believes Mr. Schorr. Owners are reluctant to part with properties because, if they set out to make a new purchase, they could easily end up with a significantly higher 30-year rate for a property of the same size they had before, or even smaller.

"Transfer to a different property, with a different loan, say, 7 percent, and your cost is astronomically increasing. It's creating reluctance to get into the market, and reluctance to sell," Mr. Schorr said.

"People want cheaper housing, but cheaper is a relative term, because a million-dollar home with a 3 percent interest rate is much cheaper than a million-dollar home with an 8 percent interest rate. It's just the cost of the loan," he said.

Whatever the outcome of the NAR lawsuits underway in multiple states, they will not change the macroeconomic dynamics.

The Epoch Times has reached out to the NAR for comment.

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Michael Washburn
Author (Reporter)

Michael Washburn was a New York-based reporter who covered U.S. and China-related topics for The Epoch Times. He has a background in legal and financial journalism, and also writes about arts and culture. Additionally, he is the host of the weekly podcast Reading the Globe. His books include "The Uprooted and Other Stories," "When We're Grownups," and "Stranger, Stranger."

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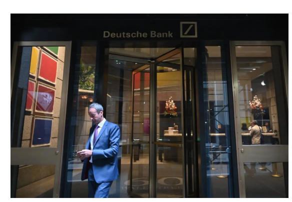

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