



Q&A Following the *Burnett v. NAR, et al.* Antitrust Jury Verdict

November 8, 2023

Can you summarize what happened in of the Jury Trial in Missouri?¹

The plaintiffs in *Burnett* hired REALTOR® listing agents in Kansas City, Missouri, to sell their homes in the MLS. All the plaintiffs signed a listing agreement where they agreed to pay a commission upon sale of their home and acknowledged that part of the commission paid to the listing firm would, potentially, be shared with a cooperating agent. The plaintiffs had successful transactions, and the commissions in each transaction were split between the listing firm and cooperating buyer agents.

In the lawsuit, the plaintiffs' lawyers alleged that the plaintiffs overpaid commissions to the listing firm in these transactions. In particular, the plaintiffs claimed that but for the rules promulgated by the National Association of REALTORS® ("NAR") and implemented by local associations and real estate firms, the sellers would not have had to pay the buyer agent's commission at all, thus paying a much lower overall commission rate. The plaintiffs relied heavily on MLS Handbook section 2-G-1, the Clear Cooperation Rule, Standards of Practice 16-15 and 16-16, and historical rates of compensation in the Kansas City MLS and nationwide.

NAR and the other real estate firm defendants argued that the court should dismiss the case on many grounds prior to trial, including that the MLS rules and the Code of Ethics provide market competition and value to sellers and buyers alike. NAR also provided evidence that the procedures and rules in issue did not create antitrust violations.

The court rejected these arguments and submitted the case to the jury anyway. In rejecting NAR's arguments, the court noted that an antitrust conspiracy does not require an explicit agreement of any kind, and because commission rates in the United States have remained unusually uniform between 5% and 6%, even with increased market pressure from real estate technology companies in recent years, that the plaintiffs had forecast enough evidence to send the question to the jury.

The case was submitted to the jury on October 31, 2023, and after less than three hours of deliberation, the jury found NAR and the real estate firm co-defendants liable for violations of the Sherman Act, which are the federal antitrust statutes.

What is next for NAR in the *Burnett* case?

NAR will ask the trial judge to reduce the amount of the jury's verdict and intends to appeal the case. You can stay updated about this process, which will likely take years to complete, by accessing NAR's information page: <https://www.nar.realtor/competition-in-real-estate/burnett-trial-updates>. If an appellate court rules in NAR's favor, then the jury's verdict could be overturned entirely, or another trial could be ordered. The appellate court could also affirm the jury's verdict in whole or in part. It is therefore too early to tell what an appellate court may do.

¹ This summary created from the allegations and facts cited in the Amended Complaint (Document #38), Class Certification Order (Document #741), Order Denying Summary Judgment (Document #1019), and Jury Instructions (Document #1292) in *Burnett v. NAR, et al.*, Case No. 19-CV-00332-SRB in the United States District Court, Western District of Missouri, Western Division. All documents are available online at <https://pacer.uscourts.gov/>.

What can we learn from the *Burnett* verdict?

Now more than ever, NC REALTORS® need to ensure there is transparency with your clients about their choices and your terms. Using and reviewing with your clients NCR's Buyer Agency Agreement and NCR's Listing Agreement to help your clients understand exactly what services you provide and how much you charge. It is essential that NC REALTORS® to discuss these agreements with your clients and answer their questions regarding the compensation charged.

What should NC REALTORS® do in response to this case?

Technically speaking, the *Burnett* jury verdict does not affect North Carolina since it is from Missouri. That said, it is entirely possible that similar lawsuits could be filed in North Carolina, and some have already been filed in other states. As such, it may benefit REALTORS®, real estate firms, MLSs, and local boards to adjust their business practices to avoid antitrust allegations. REALTORS®, real estate firms, MLSs, and local boards should all consult with their respective counsel and may consider the following, among other topics:

1. **Listing Commissions:** Cooperating compensation is still permitted, and as has been shown many times, it offers benefits to both buyers and sellers. It would be good to examine policies to make sure that sellers are being fully informed about how their commissions are used, including how much is being paid to cooperating agents. Sellers should be made aware that they are under no obligation to pay cooperating agent commissions, including cooperating compensation to seller subagents.
2. **Buyer Agent Commissions:**
 - a. *Disclosure.* Examine policies to make sure buyers are aware that sellers may not offer cooperating compensation, and that buyers may need to pay their agents from their own funds.
 - b. *Avoid Steering.* Buyer agents should put their fiduciary duty to the buyer first and avoid steering their buyers only toward properties that offer cooperating compensation that will cover the buyer's monetary obligation to their agent.
 - c. *A la Carte Compensation.* Buyer agents may want to consider alternate forms of compensation, such as a flat fee or an hourly rate, if no cooperating compensation is offered. This may mean that buyer agents may want to consider altering the services they offer to reflect the amount of compensation due.
 - d. *VA Loans.* Buyers using VA loans are still not permitted to pay buyer agent commissions from their own funds. Assisting these buyers is still important, but it may take time for the VA to adjust its policies, if it chooses to do so at all. In the interim, buyer agents will need to understand the risk in representing these clients if they find a property that does not offer cooperating compensation.

Use existing tools designed for buyers and sellers like the North Carolina Real Estate Commission's Working with Real Estate Agents Q&A to get the conversations about compensation started early.

3. **Use of Standard Form 220: Confirmation of Compensation, Agency, and Appointment:** Agents may need to use Form 220 more often to negotiate cooperating compensation. Form 220 can be used by buyer agents and listing agents to negotiate cooperating compensation directly. Pursuant to Standard of Practice 3-1, cooperating agents should determine compensation terms, if any, prior to an offer being made. Remember that a REALTOR® may not make submission of an offer to purchase contingent on the listing firm adjusting its rate of cooperating compensation, if any.
4. **Franchise Agreements and Firm Policies Regarding Compensation.** The plaintiffs in *Burnett* submitted franchise agreements, firm policies, and agent training materials as evidence to show antitrust violations. Several of the allegations cited mandatory compensation requirements per firm policy as well as mandatory membership in REALTOR® associations. If you are part of franchise agreement or if your firm has a policy regarding minimum commission rates, you may want to consult with your counsel as well as franchise counsel, if applicable, about changes that can be made to avoid antitrust claims.

5. **No Standard Commission Rates.** It bears repeating that there is no standard commission rate. This is true for listing firm commissions, buyer agent commissions, seller subagent commissions, and cooperating compensation. Agents should negotiate their compensation with their sellers and buyers, and it should reflect the agent's skill, value, time, and other factors, including whether cooperating compensation (whether offered or accepted) is in the client's best interest.

PLEASE NOTE that our Legal Hotline attorneys and staff at NCR are doing their absolute best to provide you with helpful information. However, NCR is not able to give specific advice about issues 1-5 above. You will need to consult with a private attorney regarding these topics to obtain specific advice and make any changes to your business practices and policies, if any.

What is NC REALTORS® doing?

We understand that the *Burnett* case may be disturbing and the result upsetting. We also understand that there are misunderstandings regarding the implications of this verdict.

We provide helpful, specific information to our members. In addition to putting out this Q&A, NCR will be providing information sessions online and, on our website, to answer questions. Our staff and committee volunteers are already examining our standard forms to make any changes that may be necessary and will continue to communicate with NAR and our other counterparts across the country.

We understand fully that REALTORS® provide a critical service to consumers, and we will continue our efforts to make sure the public knows how important you are. We will continue to provide you with the resources you need to navigate these potential changes to our industry. And finally, we will continue to provide transparent, honest information to help you navigate these challenges.

What responsibility will I have for paying the *Burnett* verdict?

None. You are not a party to this class action lawsuit and the verdict only applies in the jurisdiction of the lawsuit, primarily Missouri. Even though you are a member of NAR, and NAR was a defendant in the case, NAR has stated that it will not pass on to the individual members the cost of the verdict, if affirmed at some point after appeal.

What's the status with the Department of Justice and has anything changed in that case?

NAR reached an agreement with DOJ nearly two years ago. NAR has upheld its end of the agreement, and NAR expects the DOJ to do the same as affirmed by a federal court's careful ruling. That matter is separate from the *Burnett* case.

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