

The National Association of REALTORS® Settlement & Its Effect on Brokerage in Iowa

Drake University Law School Real Estate Transactions Seminar

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I. Introduction & Background

Membership in the National Association of REALTORS® (the “NAR”) is so ubiquitous among licensed real estate salespersons and brokers that it has been adopted widely as an eponym, with many in the public using the term “realtor” to refer to anyone in that career (despite the NAR’s efforts to the contrary).¹ According to the NAR’s LinkedIn data, it has more than 1.5 million members in the United States.² In 2024, the NAR settled a lawsuit that fundamentally changed aspects of agents’ practices³, including method of paying commissions and documentation of party representation.

The NAR practices has faced legal scrutiny of its commission schedules for nearly a century, particularly in its residential transactions. In the first half of the 20th century, the fee schedules were mandatory for NAR members. In response to legal antitrust challenges, the schedules later became “recommended” and even later were officially eliminated after mounting lawsuits and Justice Department investigations.⁴ Despite this history, agents over the last 30 years have kept generally to a formula in which a seller’s agent (the “listing agent”) would receive a commission of 5-7% of the total sale price for a residential property from his or her client, which amount would be shared equally with a buyer’s agent if one was involved.⁵ While various lawsuits were subsequently filed over the years, no significant industry shift occurred until a case known as

¹ See, e.g., Top 5 Things You Need to Know About the REALTOR Trademarks, available at <https://www.nar.realtor/logos-and-trademark-rules/top-5-things-you-need-to-know-about-the-realtorr-trademarks> (last visited March 29, 2025).

² National Association of REALTORS, LinkedIn Profile, <https://www.linkedin.com/company/national-association-of-realtors/>.

³ For simplicity in this presentation, I will use the term “agents” or “brokers” to refer to licensed salespersons and brokers who are members of the NAR.

⁴ Chance King, *Accessing the Legal and Market Implications of the Landmark Case Against the National Association of Realtors*, Vol. VI, USC Gould School of Law Business Law Digest (April 27, 2024), available at <https://lawforbusiness.usc.edu/accessing-the-legal-and-market-implications-of-the-landmark-case-against-the-national-association-of-realtors/>.

⁵ Id.

Sitzer-Burnett v. National Association of Realtors, filed in the U.S. District Court for the Western District of Missouri, was settled late last year.⁶

The purpose of this presentation is to explain the background of the case and the settlement, along with their implications for the real estate industry moving forward.

II. The *Burnett* Case

The *Burnett* case was filed in federal court by plaintiffs who had sold their homes with agents who all charged a 6% gross commission. The plaintiffs claimed that these commissions were presented by the agents as non-negotiable.⁷ Furthermore, the plaintiffs, through their brokers, each had listed their properties on a Multiple Listing Service (“MLS”) and had paid the buyer’s agent commission through a split of the listing agent’s commission. The plaintiffs alleged violations of federal antitrust law, as well as state antitrust laws. They named as defendants the NAR, as well as Realogy Holdings Corporation, HomeServices of America, Inc. (and subsidiaries/affiliates), RE/MAX, LLC, and Keller Williams Realty, Inc., which are the largest national broker franchises. It certified as a class action, significantly expanding the later effects of the case.

1. The Problem of the Cooperative Compensation

The first of the plaintiffs’ two main arguments centered on the practice of commission splitting, known in the NAR as “Cooperative Compensation.” The NAR’s Handbook on Multiple

⁶ In addition to the *Burnett* case, there were additional similar cases filed in the same Western District of Missouri and also in Illinois, Massachusetts, and other states. For purposes of this presentation, I will focus on *Burnett*, though the issues addressed are common to several cases.

⁷ Throughout this section, I draw from the Third Amended Class Action Complaint filed in the case, *available at* <https://www.mow.uscourts.gov/sites/mow/files/ca/19-cv-332-759.pdf>. For ease of discussion, I will refer to this document as the “Complaint.” This and many other related court documents and orders are available on the class action settlement’s official website, <https://www.realestatecommissionlitigation.com/documents>.

Listing Policy⁸ states that participants “make blanket unilateral offers of compensation to the other MLS participants and shall therefore specify on each listing filed with the service the compensation being offered by the listing broker....”⁹ Essentially, this translated to a routine and non-negotiable practice of splitting the listing agent’s commission with a buyer’s agent. In the complaint, the plaintiffs alleged that this amounted to a conspiracy to require that home sellers effectively agree to pay the buyer’s agent’s compensation, when buyers would otherwise pay that fee themselves.

2. The Problem of “Inflated Compensation”

In addition to the foregoing, the plaintiffs alleged that the blanket compensation led to a lack of competition among buyers’ brokers. Given that a buyer retaining a broker does not negotiate or pay the agent’s commission, any potential for competition is nullified. They cited the fact that buyer agents have served in a “diminishing role” due to buyers’ direct access to online real estate listings, but have maintained their compensation of between 2.5-3%.¹⁰ To support their claim, the plaintiffs cited other developed countries’ models, which frequently involve a total commission of between 1% and 4% of the purchase price,¹¹ rather than the average of 5-6% in the United States.

3. The Settlement Agreement

In October 2023, the jury in the *Burnett* case sided with the plaintiffs and awarded damages in the amount of nearly \$1.8 billion. A copy of the verdict form is attached for information as

⁸ See National Association of Realtors, Handbook on Multiple Listing Policy 2019, *available at* <https://www.nar.realtor/sites/default/files/documents/2019-HMLP.pdf>, *hereinafter*, the “Handbook.”

⁹ Handbook at page 34. Note that the Handbook includes letter symbols to indicate whether a policy is “M” (mandatory), “R” (recommended), “O” (optional), or “I” (informational). *See* Handbook, at title page. The section on “Commission/Cooperative Compensation Offers” was listed as “M” for mandatory.

¹⁰ Plaintiffs stated that the role is diminishing because, among other things, buyers are not solely dependent upon their brokers to search for homes; rather they can do so on their own through online sources. *See* Complaint at para. 19.

¹¹ Cited countries included the United Kingdom, Germany, Australia, and others. *See* Handbook at para. 13-14.

Exhibit “A” to this outline. Following the verdict, additional “copycat” cases were filed, including a new class-action case by the same attorneys who had represented the *Burnett* plaintiffs. With the possibility of treble damages looming under federal antitrust law,¹² the defendants, led by the NAR, understandably considered possible settlement, despite their continuing denial of liability. Following months of negotiations, a settlement was reached, which was finally approved by the Court on November 27, 2024.¹³

In exchange for a release of the NAR, its agents, offices, and others, from liability for the jury verdict and future related claims, the settlement agreement with the NAR¹⁴ included the following:¹⁵

- Payment over specified dates of a total of \$418 Million in damages
- Elimination and prohibition of the cooperative compensation requirement on the MLS
- Requirement that, to the extent consistent with other laws, all MLS participants execute a written representation agreement with buyers prior to touring any home, which includes all of the following:
 - Discloses amount and source of compensation
 - A compensation amount that is “objectively discernable and ... not... open-ended”

¹² See 15 U.S.C. § 15.

¹³ Some class members objected to the settlement and appealed to the Eighth Circuit Court of Appeals.

¹⁴ Other entities also were included in this settlement.

¹⁵ See Corrected Settlement Statement, filed April 19, 2014, in *Burnett et al. v. NAR et al.*, Case No. 19-cv-00332-SRB U.S. Dist. Court WD MO (2024), available at <https://www.realestatecommissionlitigation.com/admin/api/connectedapps.cms.extensions/asset?id=5fa6cf55-60a3-4473-8eb5-85ba512cfbe4&languageId=1033&inline=true>, hereinafter the “NAR Settlement.”

- Disallows any compensation in excess of that which agreed to in the written agreement with the buyer.¹⁶

III. Iowa Real Estate Transparency Act

1. Changes to Iowa Code ch. 543B

In the midst of the *Burnett* lawsuit and proposed settlement agreement, the Iowa legislature passed the Iowa Real Estate Transparency Act (the “Act”), SF 2291, which amends Iowa Code § 543B to effectively codify some of the settlement provisions described above. The law was signed by Governor Reynolds and became effective July 1, 2024. It is important to note that though the *Burnett* case and subsequent NAR settlement dealt with only residential matters, the Act applies equally to both residential and commercial property sales.¹⁷

Among other things, the Act¹⁸ adds Section 543B.56A(3), which requires that a brokerage agreement be signed by the broker and client before an agent makes an offer on behalf of a buyer. This is slightly—but importantly—different than the requirement under the NAR settlement that requires a written agreement between agent and buyer before a buyer even tours a home with an agent.¹⁹ It also requires that the written agreement between the broker and client specify the broker’s compensation for services at Section 543B.5(7). The execution of this agreement, or its counterpart the listing agreement, is the time at which the agency relationship commences between an agent and his or her client.

¹⁶ The settlement agreement includes additional provisions, including those related to statements about buyer agent services being provided at “no cost” and that commissions are “fully negotiable.” *Id.*

¹⁷ Importantly, the Act applies only to *sales*, not to leasing or rentals where agents are involved. Note that several of the rule changes discussed below also apply to lease transactions.

¹⁸ A copy of the Act is attached hereto as Exhibit “B”.

¹⁹ See the Settlement, at para. H(58)(vi).

2. Changes to the Iowa Administrative Code ch. 193E

Changes to the Iowa Administrative Code also were necessary given the changes made to Chapter 543B. These changes went into effect August 14, 2024²⁰. Among the changes were the following:

- Brokers may now seek to negotiate or change another broker's compensation²¹
- Brokerage agreements must include the broker's policy on compensating other brokerages, along with any other method for compensating another party's broker²²
- Brokerage agreement may authorize a seller's broker to disburse part of their compensation to other brokers,²³ but no one can be required to pay another person's broker without consent²⁴
- Brokers may be compensated by more than one party, and the parties no longer need to consent in writing to such compensation prior to execution of a purchase agreement²⁵
- Seller may pay brokers through the proceeds of a transaction or in another manner, even if a broker is representing only the buyer.²⁶

IV. Conclusion

It remains to be seen whether the changes brought on by the NAR settlement and the Iowa Real Estate Transparency Act will lead to changes in commission rates and agent practices, or whether there will simply be a "new normal" where the historical practices are replicated with

²⁰ See Iowa ARC 8102C July 10, 2024 (adopted and filed), *available at* <https://www.legis.iowa.gov/docs/aco/arc/8102c.pdf>.

²¹ Rescission of 193E Iowa Admin. Code 7.15(2), 11.1(5), and 11.1(6).

²² Modification of 193E Iowa Admin. Code 11.3(1)(a).

²³ Replacement of 193E Iowa Admin. Code 11.3(9). Note that this appears to explicitly allow commission splitting if it is set forth in the brokerage agreement, rather than being a part of the MLS.

²⁴ New subrule 193E Iowa Admin. Code 11.3(10).

²⁵ Modification of 193E Iowa Admin. Code 11.3(6)(c).

²⁶ New section 193E Iowa Admin Code 11.3(6)(k).

the exception that buyer agent compensation will be disclosed in a new, separate form that is routinely included in all transactions at the “standard” rate. Certainly, the settlement and Act have cracked the door on the possibility for changes in the compensation of brokers for years to come.

VERDICT FORM

1. Do you find that Class Plaintiffs have proved by a preponderance of the evidence that a conspiracy existed to follow and enforce the Cooperative Compensation Rule in the subject MLSs during the conspiracy period alleged in this case – April 29, 2015 through June 30, 2022?

YES X NO _____

If your answer to Question 1 is "Yes", proceed to Question 2. If your answer to Question 1 is "No", stop here and your deliberations are complete; do not answer any remaining questions on this Verdict Form, and proceed to the signature page.

2. Do you find that the conspiracy set forth in Question 1 had the purpose or effect of raising, inflating, or stabilizing broker commission rates paid by home sellers?

YES X NO _____

If your answer to Question 2 is "Yes", proceed to Question 3. If your answer to Question 2 is "No", stop here and your deliberations are complete; do not answer any remaining questions on this Verdict Form, and proceed to the signature page.

3. Which of the following corporations or entities do you find knowingly and voluntarily joined the conspiracy set forth in Question 1 with the purpose of furthering its goals?

National Association of Realtors YES X NO _____

HomeServices of America, Inc. YES X NO _____

BHH Affiliates, LLC YES X NO _____

| | | | | |
|------------------------------|-----|----------|----|-------|
| HSF Affiliates, LLC | YES | <u>X</u> | NO | _____ |
| Keller Williams Realty, Inc. | YES | <u>X</u> | NO | _____ |
| Anywhere Real Estate, Inc. | YES | <u>X</u> | NO | _____ |
| RE/MAX LLC | YES | <u>X</u> | NO | _____ |

4. Do you find that the conspiracy set forth in Question 1 caused the Class Plaintiffs to pay more for real estate brokerage services when selling their homes than they would have paid absent that conspiracy?

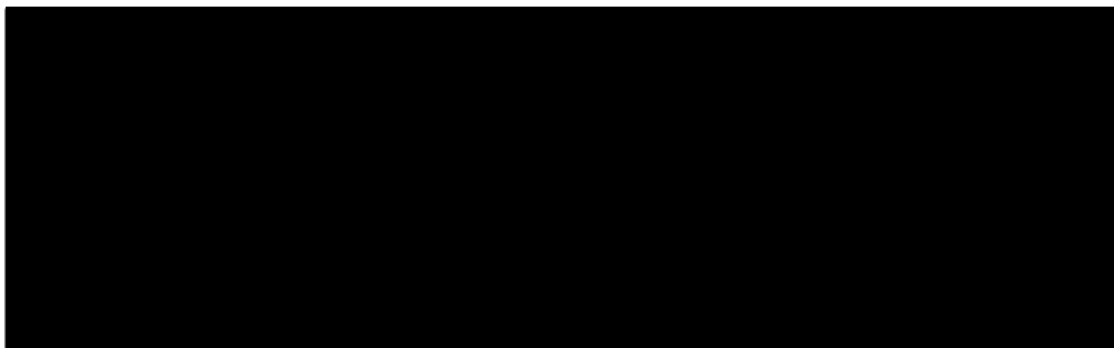
YES X NO _____

If your answer to Question 4 is "Yes", proceed to Question 5. If your answer to Question 4 is "No", stop here and your deliberations are complete; do not answer any remaining questions on this Verdict Form, and proceed to the signature page.

5. State the amount of damages proved by the Class Plaintiffs.

\$ 1,765,310,872

Please sign and date indicating that you unanimously agree on the above responses.



Date:

10/31/2023



KIM REYNOLDS
GOVERNOR

OFFICE OF THE GOVERNOR

ADAM GREGG
LT GOVERNOR

April 19, 2024

The Honorable Paul Pate
Secretary of State of Iowa
State Capitol
Des Moines, Iowa 50319

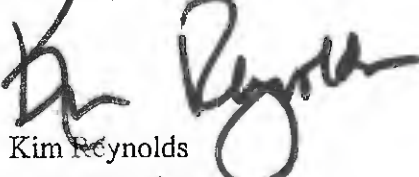
Dear Mr. Secretary,

I hereby transmit:

Senate File 2291, an Act relating to real estate brokers and brokerage agreements.

The above Senate File is hereby approved on this date.

Sincerely,


Kim Reynolds
Governor of Iowa

cc: Secretary of the Senate
Clerk of the House



Senate File 2291

AN ACT

RELATING TO REAL ESTATE BROKERS AND BROKERAGE AGREEMENTS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Section 543B.3, subsection 9, Code 2024, is amended to read as follows:

9. Prepares offers to purchase or purchase agreements, listing contracts, buyer's representation agreements, agency disclosures, real property residential and agricultural rental agreements, real property commercial rental agreements of one year or less, and groundwater hazard statements, including any modifications, amendments, or addendums to these specific documents.

Sec. 2. Section 543B.5, subsections 2, 7, 9, and 10, Code 2024, are amended to read as follows:

2. ~~"Agency agreement"~~ "Agency disclosure" means a written ~~agreement~~ disclosure between a broker and a client which identifies the party the broker represents in a transaction.

7. "Brokerage agreement" means a contract between a broker and a client which establishes the relationship between the parties as to, and the broker's compensation for, the brokerage services to be performed and contains the provisions required in section 543B.56A.

9. "Client" means a party to a transaction who has ~~an agency~~ a brokerage agreement with a broker for brokerage services.

10. "*Customer*" means a consumer who is not being represented by a licensee under a brokerage agreement but for whom the licensee may perform ministerial acts.

Sec. 3. Section 543B.5, Code 2024, is amended by adding the following new subsection:

NEW SUBSECTION. 8A. "*Buyer's representation agreement*" means a brokerage agreement between a prospective buyer and a broker.

Sec. 4. Section 543B.56, subsection 1, Code 2024, is amended to read as follows:

1. *Duties to all parties in a transaction.* In providing brokerage services to ~~all parties~~ a client to a transaction, a licensee shall do all of the following:

~~a. Provide brokerage services to~~ Treat all parties to the a transaction ~~honestly and in~~ with honesty and good faith.

~~b. Diligently exercise reasonable skill and care in providing brokerage services to all parties.~~

~~c.~~ b. Disclose to each party all material adverse facts that the licensee knows except for the following:

(1) Material adverse facts known by the party.

(2) Material adverse facts the party could discover through a reasonably diligent inspection, and which would be discovered by a reasonably prudent person under like or similar circumstances.

(3) Material adverse facts the disclosure of which is prohibited by law.

(4) Material adverse facts that are known to a person who conducts an inspection on behalf of the party.

~~d.~~ c. Account for all property coming into the possession of a licensee that belongs to any party within a reasonable time of receiving the property.

Sec. 5. Section 543B.56, subsection 2, paragraph c, Code 2024, is amended to read as follows:

c. Fulfill any obligation that is within the scope of the agency brokerage agreement, except those obligations that are inconsistent with other duties that the licensee has under this chapter or any other law.

Sec. 6. Section 543B.56, subsection 2, Code 2024, is amended by adding the following new paragraph:

NEW PARAGRAPH. e. Diligently exercise reasonable skill and care in providing brokerage services.

Sec. 7. Section 543B.56A, subsection 2, Code 2024, is amended by adding the following new paragraph:

NEW PARAGRAPH. e. Review the broker's compensation under the brokerage agreement.

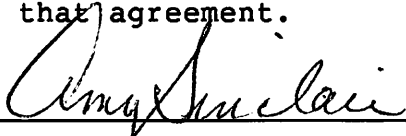
Sec. 8. Section 543B.56A, Code 2024, is amended by adding the following new subsection:

NEW SUBSECTION. 3. A brokerage agreement must be signed by both the broker and the client prior to the broker listing any property for sale on behalf of a seller, or making an offer on a property on behalf of a buyer.

Sec. 9. Section 543B.60, Code 2024, is amended to read as follows:

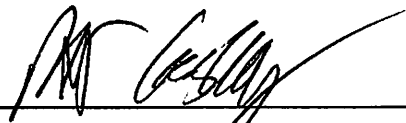
543B.60 Licensees providing services in more than one transaction.

A licensee may provide brokerage services simultaneously to more than one party in different transactions unless the licensee agrees with a client that the licensee is to provide brokerage services only to that client. If the licensee and a client agree that the licensee is to provide brokerage services only to that client, the agency ~~agreement~~ disclosure required under section 543B.57, subsection 1, shall contain a statement of that agreement.



AMY SINCLAIR

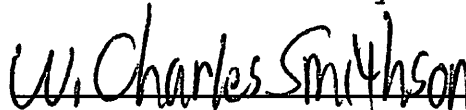
President of the Senate



PAT GRASSLEY

Speaker of the House

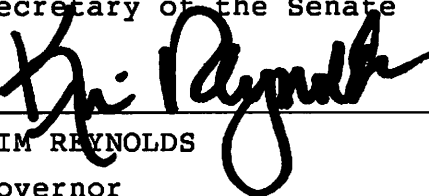
I hereby certify that this bill originated in the Senate and is known as Senate File 2291, Ninetieth General Assembly.



W. CHARLES SMITHSON

Secretary of the Senate

Approved April 19th, 2024



KIM REYNOLDS

Governor