



BRAVE NEW WORLD OF BROKER COMMISSIONS & ESCROW ISSUES

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REBA Spring Conference 2025



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What to Expect:

- Review of the major broker commission cases, decisions and settlements
- Update on Massachusetts connection: *Nosalek v. MLSPIN*
- A look at the residential real estate landscape and broker business shifts:
 - New forms
 - Compliance and risk management
 - Escrow management disconnect
- Status check on current/potential anti-trust litigation in residential real estate

Broker Compensation Cases

What are these cases about?

- The “**Cooperative Compensation Rule**”

- Participants required to make blanket, unilateral offer of compensation to buyer brokers to submit a listing to a REALTOR-affiliated MLS (*MLS PIN also adopted a version of this rule*).

- NAR says this is a disclosure rule; commission negotiable.

- P’s say the widespread use and enforcement of this Rule was a **conspiracy to inflate broker commission rates** in violation of the Sherman Antitrust Act.



Seller Cases: Moehrl (2019, Illinois); Burnett (Sitzer)(2019, Missouri); Nosalek v. MLSPIN (2020)

- **Burnett Verdict: Oct. 31, 2023: \$1.78 billion / 500k Missouri sellers**
- **Settlements – \$/rule changes**

Copy Cat Cases: Gibson (2023, Missouri); Burton (2023, South Carolina); March (2023, New York); QJ Team (2023, Texas); Parker (2023, FL); Center (2023, PA)....

- *30+ cases filed, over 250 defendants.*
- *Created nationwide class*

Buyer Cases: Batton 1 (2022, Illinois, originally Leeder 2021) Batton 2 (2023); Tuccori (2023, Illinois)

- *Indirect purchaser, state claims/ nationwide – (Late 2025)*

NAR Settlement Class + Release

Executed: March 15, 2024 ; Class Notice: Aug. 17, 2024; Final Approval: Nov. 27, 2024

- Practice Changes (Aug 2024)
- \$418 Million to Settlement Fund

Parties: NAR & P's in *Burnett, Moehrl, Umpa and Gibson*

“all persons who sold a home” that was listed on **“MLS anywhere in the US”** where a commission was paid to any brokerage in connection with the sale of a home **MLSPIN – Dec. 17, 2016 to Class Notice**

Released parties: NAR/ REALTOR MLS/ OPTING-IN MLS/ REALTORS/ REALTOR brokerages (transaction limits/or negotiated opt-in)

- Member as of Class Notice date & complies with practice changes

Release includes all antitrust, consumer protection claims brought in similar actions **state and federal** (limiting Buyer Cases)

NAR Practice Changes

(in a Nutshell)

- No requirement to offer compensation
- MLS not the place to enter or view compensation.
- The brokerage, with written permission from seller, can offer compensation on their own websites; listing sheets, etc. for their own listings
- Terms of Disclosure (commissions are not set by law/negotiable)
- Requirement to use Listing and Buyer Agreements
- Cannot receive more for representation of buyer than what buyer agreed to pay.

Massachusetts Connection

Nosalek v. MLS Property Information Network

Seeks class-action status and alleges that the sharing of commissions between listing and buyer brokers inflates seller costs and is a conspiracy in restraint of trade, a violation of the Sherman Antitrust Act.

Filed: 12/17/2020

MLS PIN filed Settlement: 6/30/2023

DOJ Statement of Interest: 2/15/24

Plaintiffs Motion to Stay granted: 2/14/2024

**MDL &
NAR Settlement**

Status Conference: 1/27/2025

Prelim. Approval Hearing : 4/1/2025 – denied.

Leave to file amended settlement, extended to May 20, 2025

Another DOJ SOI? – Yes.

This Case Stands Out – Why?

- REALTOR Ass'n not a defendant in this case. D is a non- REALTOR MLS that had a variation of the cooperative compensation rule.
- MLS PIN chose not to opt-in to the NAR Settlement, and the proposed settlement directly contradicts the NAR Settlement in that it allows sellers to make pre-emptive offers of compensation to buyer brokers via the MLS.
- It is the only seller compensation lawsuit that the DOJ has called for the prohibition of pre-emptive offers of compensation (of any kind/via any means) from listing broker OR seller to buyer brokers.

MLS PIN (proposed) Settlement v.3

1. Remove a requirement that sellers must offer compensation to buyer brokers on MLS PIN;
2. Require listing brokers to notify sellers that they're not required to offer compensation to buyer brokers and that they can decline if a buyer broker requests compensation;
3. Clarify that if the seller makes an offer to a buyer broker and the buyer makes a counteroffer, commissions would be negotiated among the seller, the buyer, the seller-broker and the buyer-broker; ***invitation to make an offer***
4. Pay \$3.95 million into settlement fund; ↑
5. **Covers all real estate listings (not just residential);** ↑
6. Releases Participants and Subscribers.

DOJ's Statement of Interest:

- Inadequate “Cosmetic Changes”
 - Will not drive down commissions
 - Still allows Sellers/Seller Broker to set Buyer's Broker compensation
 - Steering concerns remain
- DOJ instead calls for –***“an injunction that prohibits offers of buyer- broker compensation by MLS PIN participants.”***
- Found issue with requirement for buyer agreements (*Sitzer/Burnett*)
- Like In *Sitzer/Burnett*, Judge Saris can still approve the Settlement over DOJ's objection.

It is an opportunity



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Forms Update Takeaways:

- Contract to Purchase: inclusion of request for fee coverage;
- Fee Agreements (Buyer, Seller (Listing), Facilitator) adjustments for flexibility – term, payment, etc.; separation of fees;
- Unrepresented Buyer Disclosure; Seller agency limits/unintended dual agency; buyer due diligence;
- Purchase and Sale Agreement commission fee variability; Brokerage Info, Escrow and Commission Worksheet to help with this;
- Termination/Amendments of Fee Agreements

Contract to Purchase

2. **Compensation to Buyer Broker.** *(Delete if Waived)* the BUYER's obligations under this agreement are subject to SELLER'S agreement to pay ☐ _____% of the gross selling price of the Premises or ☐ a flat fee of \$_____dollars to _____, the "BUYER'S BROKER" at the time of closing. (check one of the following):

☐ This compensation is independent of and in addition to the _____ (\$/%) offer of compensation made by the LISTING BROKER to the BUYER'S BROKER.

☒ There is no offer of compensation made by the LISTING BROKER to the BUYER'S BROKER or that offer was rejected.

- **Assumes Buyer Agreement and Buyer Request of Seller.**
- **Allows for variety of business practices but seeks transparency.**



Removal of Compensation Based on “Net” Sale

“net” sale was defined by the MLS platform and traditionally, any reduction to the sales price on the offer form itself defined the “net” so for example:

A \$500,000 offer
With a \$5,000 closing cost credit
Would make a Net sale = \$495,000

Historically, commissions paid in the transaction were not deducted from the sales price offered – it was a predetermined offer amount set by seller and managed through brokerages prior to the offer being made and therefore easy to compute as reflected in the example.

Now that the Contract to Purchase has been updated to allow for the inclusion of buyer broker compensation as a term of the buyer’s offer to purchase we are missing how to properly define “net” sales price to calculate a commission / it becomes a moving target and unclear math.



**REBA's Standards & Forms Committee Offers
Provisional Revisions to Residential Purchase and Sale Agreements
Relating to Real Estate Commissions**

The Listing Broker (Company)/Agent and the Buyer's Broker (Company)/Agent shall each provide to the closing attorney within a reasonable amount of time prior to the Closing a commission statement together with the name, address, phone number, email, Agent State License ID number and Brokerage State License ID number.

Listing Broker (Company)/Agent's Commission:

A commission in the amount of \$_____ is due from SELLER to _____, being the Listing Broker (Company)/Agent, payable only upon the recording of the deed to the BUYER with the Registry of Deeds and payment of all monies due the SELLER, but not otherwise.

Buyer's Broker (Company)/Agent's Commission:

A commission in the amount of \$_____ is due to _____, being the BUYER's Broker (Company)/Agent, payable upon the recording of the deed to the BUYER with the Registry of Deeds and payment of all monies due the SELLER, but not otherwise, and is due from the following:

A. The amount of \$_____ is due from BUYER to _____, being the BUYER's Broker (Company)/Agent.

B. The amount of \$_____ is due from SELLER to _____, being the BUYER's Broker (Company)/Agent, which SELLER agrees and directs shall be paid by the Listing Broker (Company)/Agent from funds held in escrow.

Direction to Escrow Agent: The Escrow Agent holding the Deposit as set forth in this Agreement is responsible for disbursing funds in compliance with the terms of this Agreement. Upon the recording of the deed to the BUYER with the Registry of Deeds and payment of all monies due the SELLER, the Escrow Agent shall disburse funds as set forth above and the Escrow Agent shall disburse the balance of the deposit, if any, to the SELLER as excess deposit. SELLER, BUYER and Escrow Agent acknowledge that all disbursements from funds held in escrow are undertaken in the Escrow's Agent's capacity as Escrow Agent and not otherwise. These written instructions to the Escrow Agent constitute mutual, written instructions from the SELLER and BUYER to the Escrow Agent and supersedes any office policy of the Escrow Agent to the contrary.



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Managing The Escrow Disconnect

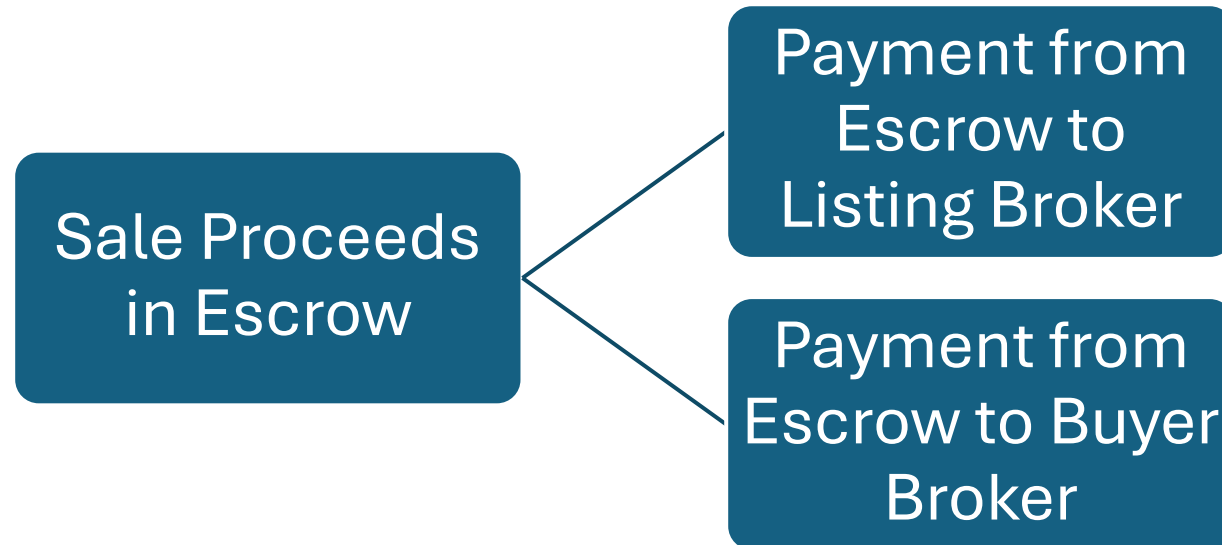
- 1. Clarifying the difference** – disbursement of seller funds from escrow vs. making cooperative payment from operating.
- 2. Focusing on the law** – protection of escrow agents when following mutual written instructions.
Zang v. NRT New England Inc., 77 Mass. App. Ct. 665, 933 N.E.2d 694 (Mass. App. Ct. 2010)
- 3. Talking about audits** – disbursements should match the PSA and settlement statement.
- 4. Providing options up front** – the listing broker does not have to be the escrow agent; can discuss options with closing attorney re: disbursements.

Escrow Funds vs. Brokerage Funds

Cooperating Compensation Model:



Seller Compensating Buyer Broker Directly:



The Best Risk Management Advice?

Set Expectations



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Having Hard Conversations - Practical Limits

- Not many buyers will have the broker compensation payment saved and ready to pay.
 - Perfect storm: High prices, high interest rates, low inventory
- FHA/VA have limits / restrictions on what buyer's pay and how high of a credit the loan can absorb.
- Many home buyer programs have limits, are severely competitive and under sourced and go to down payment assistance.
- Two-Tiered Conversation
 - Do you want buyer representation? Can you afford it if the Seller does not offer co-op compensation or refuses it in the offer?

Train About...

1. Fair Housing & Unconscious Bias Training

- Make sure that unconscious bias is not being used to vet buyer clients, keep an eye to protected classes; Use objective criteria.

2. Dual Agency Training & Discussing the Potential Dangers of Unrepresented Buyers

- Buyers who do not know how to navigate disclosures (MA: “Buyer Beware”; inspection and appraisals – buyer remorse.

3. Fiduciary Relationships and Contracts

- Everything comes back to this relationship; amendments, sharing, termination.

The new
DOJ



Looking Forward: Today's Real Estate Antitrust Litigation



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Today's Antitrust Litigation Landscape

- Most broker compensation cases brought by sellers have been stayed as to some or all defendants
- Other are ongoing and we may see substantive decisions (Gibson)
- Additional cases are ongoing that challenge non-compensation related to MLS rules and policies:
 - **Clear Cooperation Policy**
 - **No-Comingling Rule**

Can you actually end a case with the DOJ?
Rentals? Referrals? Commercial?

UNITED STATES OF AMERICA v. REALPAGE, INC., 1:24-cv-00710, (M.D.N.C.)

August 23, 2024. (Plaintiff also are State AG's, including MA) (Defendants also include large Landlords)

Alleged Violation of Section 1 and Section 2 of Sherman Act

- RealPage and Landlords unlawfully shared information and engaged in price alignment schemes (**price-fixing**).
- RealPage has and maintains an illegal **monopoly** in commercial revenue market scheme.
- The company's rent-setting algorithm collected private data from competing landlords and used it to recommend higher rental rates.
- This coordination allegedly allowed large property managers to inflate prices while minimizing the risk of undercutting each other.

A Ban on Broker Fee Shifting in Rentals?

Gov. Healey announced Fiscal 2026 Budget proposal will include section to eliminate renter-paid broker fees.

- Proposal will require the fee to be paid by (which is usually the landlord) whoever hires the broker

